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THE FOUNDATION OF TORTIOUS LIABILITY

IN his recent book *The Law of Tort*, Professor Winfield in his introductory chapter takes the position that "all injuries done to another person are torts, unless there is some justification recognised by law."[1] This view that the law of tort (or of torts as we prefer to call it) is based on a single principle is not a novel one and has high authority in its support. It was first stated by Sir Frederick Pollock and has been accepted, although with some hesitation, by Dr. Stallybrass and Dr. Allen. It would therefore seem to be a hazardous undertaking to challenge this theory at the present time were it not that these four eminent protagonists do not seem to be in agreement concerning the nature of this fundamental principle, and are even more divided as to the date of its origin. According to Professor Winfield it has been a definite part of English law for over six hundred years, but Sir Frederick Pollock suggests that it is essentially a modern principle: Dr. Allen believes that it is still in the process of recognition, while Dr. Stallybrass seems to hesitate between these three possibilities. There is more agreement on the question of authority, for the four authors can amongst themselves gather only five cases[2] in which this fundamental principle has been

[1] P. 15.

[2] *Chapman* v. *Pickersgill* (1762), 2 Wils. 145. *Mogul Steamship Co. Ltd.* v. *McGregor* (1889), 23 Q.B.D. 598, 613. *Skinner & Co.* v. *Shew & Co.*, [1893] 1 Ch. 413, 422. *Gardiner* v. *Croasdale* (1760), 2 Burr. 905, 906. *Manton* v. *Brocklebank*, [1923] 1 K.B. 406, 413.

directly stated. In view of this divergence of opinion it is convenient to discuss separately the views advanced by each of the writers before attempting a synthesis.

Sir Frederick Pollock begins with a statement relating to general jurisprudence—

"All members of a civilised commonwealth are under a general duty towards their neighbours to do them no hurt without lawful cause or excuse. The precise extent of the duty, as well as the nature and extent of the recognised exceptions, varies according to the nature of the case. But this does not affect the generality of the principle, any more than the infinite variety of matters about which contracts may be made, and the considerable though finite number of different known kinds of contracts, with special rules as to the effect and fulfilment of each of them, affect the truth of the general proposition that we must perform our contracts."[3]

It is interesting to note that in this analogy Pollock uses the word *contract* and not *agreement*. He does not state that there is a general principle of law that all agreements must be performed, for it is generally recognised that no such general principle exists. It is necessary to prove that an agreement is of a particular kind known as a contract. The duty of contractual performance arises, in Pollock's words, only in a "finite number of different known kinds of contracts." A man is not bound to perform all his agreements although by failing to do so he may injure his neighbour: unless his agreement falls within a definite type of contract he is not liable. Pollock's analogy would therefore seem to support the view that there is no general principle of tortious liability, but merely a considerable though finite number of different known kinds of torts. The ways of committing these torts may, of course, be infinite, but the torts themselves are finite.

Turning from general jurisprudence to English law Sir Frederick says: "Down to our own time it was difficult to find any definite authority for stating as a general proposition of English law that it is a wrong to do wilful harm to one's neighbour without lawful justification or excuse."[4] Here we get quite a new general principle because the word "wilful" has been added. There is all the difference in the world between liability for harm in general and liability for wilful harm, because the number of instances in which harm is inflicted merely for the purpose of harming must be exceedingly rare. These *abus de*

[3] *Law of Torts*, 13th Ed., p. 1.
[4] *Ibid.*, p. 20.

droit cases can be counted on a single hand.[5] Pollock's general principle is, therefore, much narrower than the one suggested by Professor Winfield. This narrow principle is further limited by "a settled general rule in our law that when an act is done in the exercise of a common right, the motive is immaterial."[6] Sir Frederick does not define what he means by a common right, but use of one's own land and trade competition seem to fall within the term.[7] With all respect, this leaves us with an impressive sounding formula which on analysis seems to have virtually no content.

It is not surprising, therefore, that Sir Frederick cites no case which is specifically based on this fundamental principle of English law, but is content to refer to three dicta, two of them by Lord Justice Bowen. In *Mogul Steamship Co.* v. *McGregor* the learned Lord Justice said: "Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse."[8] But immediately before this sentence he had quoted the following passage from the Privy Council in *Rogers* v. *Rajendro Dutt*:[9] "It is essential to an action in tort that the act complained of should under the circumstances be legally wrongful as regards the party complaining; that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do a man harm in his interests, is not enough." In other words, the plaintiff must establish that he has a definite legal right before the defendant's act, however injurious and malicious, can be said to be legally wrongful. It is hardly necessary to add that in the *Mogul* case the plaintiff failed. Bowen L.J.'s next dictum is from *Skinner & Co.* v. *Shew & Co.*[10] In this case the point at issue was whether s. 32 of the Patents, Designs, and Trade Marks Act, 1883, covered threats made in good faith. In holding that it did, Bowen, L.J., in distinguishing the state of the law before the

[5] On these cases see Professor H. C. Gutteridge's valuable article "Abuse of Rights," 1933, 5 *Cambridge L.J.* 22. He emphasises the difference between the English and the Continental law on this point, saying (at p. 30) that "it is clear that the theories of abuse and of relativity of rights, in general, have no place in our law as it now stands."

[6] *Op. cit.*, p. 23.

[7] We have been unable to find any further reference to "common rights" in Pollock's *Jurisprudence* or his other works. Professor Winfield in his article "The Foundation of Liability In Tort," 27 *Columbia L.R.*, 1, says at p. 10: "Most torts are subject to what Sir Frederick Pollock has happily styled general exceptions from liability, such as 'act of state,' exercise of common right, executive act," but he, like Pollock, makes no further attempt to distinguish a *common right* from any other kind of right.

[8] Cf. n.2.

[9] (1860), 13 Moore, P.C. 209.

[10] Cf. n.2.

statute was passed, pointed out that in the action for slander of title it was necessary to show that the defendant had acted falsely and maliciously. It was in this connection that he used his much-quoted sentence, "At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse." It seems rather difficult to attribute to so great a judge as Bowen the intention of stating a general and fundamental principle of law when all that he was directly concerned with was the technical doctrine of malice in the action for slander of title. Sir Frederick's third authority is *Chapman* v. *Pickersgill*.[11] Of this he says: "Pratt, C.J., afterwards Lord Camden, struck a modern note a full century and a quarter earlier, repelling counsel's objection against a novel cause of action: 'torts are infinitely various, not limited or confined.'"[12] This was an action upon the case for falsely and maliciously suing out a commission of bankruptcy against the plaintiff. Apparently the Lord Chief Justice did not consider that he was creating a new tort for he said, "Now whenever there is an injury done to a man's property by a false and malicious prosecution, it is most reasonable he should have an action to repair himself. (See 5 Mod. 407, 8; 10 Mod. 218; 12 Mod 210.) I take these to be two leading cases, and it is dangerous to alter the law." His later statement about torts being infinitely various was therefore not necessary, for the decision of the case, as this, in his view, was based on prior authority. It is important to note that Sir Frederick speaks of this dictum as striking "a modern note," thus suggesting that Lord Camden's view was not typical of eighteenth century legal opinion.

May we, without any disrespect to the memory of Sir Frederick, suggest that he placed too much emphasis on these three dicta, and that he did so because, having first stated as a proposition of general jurisprudence what a civilised law of tort ought to contain, he was anxious to prove that this could be found in the modern common law.

Sir John Salmond, as is well known, held the contrary view that there was no general fundamental principle behind the law of torts. "Just as the criminal law consists of a body of rules establishing specific offences, so," he said, "the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability."[13] Dr. Stallybrass, his present editor, seems to disagree

[11] Cf. n.2.
[12] *Op. cit.*, p. 22, n.(*b*).
[13] 9th Ed., p. 17.

with this view. He puts the problem in these words: "Does the law of torts consist of a fundamental general principle that it is wrongful to cause harm to other persons in the absence of some specific ground of justification or excuse, or does it consist of a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility?"[14] It is important to note that this general principle is stated by Dr. Stallybrass far more widely than is the entirely different one by Bowen, L.J., and Sir Frederick Pollock, for Dr. Stallybrass includes all harm, while theirs is limited to wilful harm. As to the date of this general principle we are given a wide choice. The statement in this connection that "the action upon the case was elastic enough to provide a remedy for any injurious action causing damage,"[15] would suggest that this principle was one of long-standing, but later Dr. Stallybrass remarks with more caution: "The safest conclusion seems to be that, although we have not yet discovered any general principle of liability, the law is slowly but surely moving in that direction."[16] So, after all, Sir John Salmond was right when he said that there was no general principle of liability *at present*: this was all that he was concerned with, for his book was not intended to be a legal almanac dealing with interesting prophecies. He was stating the law of to-day and not of to-morrow. Turning to yesterday's law we are not quite clear whether Dr. Stallybrass intends to suggest that this general principle has existed in the past, for he quotes from *Chapman* v. *Pickersgill*[17] that "torts are infinitely various, not limited, or confined." It does seem strange that a dictum made in 1762 by a not particularly eminent judge should always be used as the foundation stone for this general principle. Shifting rapidly to more modern, and safer, authority, Dr. Stallybrass quotes Lord Macmillan's succinct phrase, "The categories of negligence are never closed."[18] He remarks that "the avenue to the development of the law is the action on the case for negligence." Undoubtedly, the modern tendency is to extend liability for negligence, but this does not mean that it is to be extended beyond the scope of intentional torts. Thus if A is not legally liable for intentionally violating B's privacy, he certainly cannot be held liable for doing so negligently. Until we can say that all intentional harm is tortious, we shall not be able to say that all negligent harm is wrongful. Finally, Dr. Stallybrass

[14] *Op. cit.*, p. 17.
[15] *Ibid.*, p. 19.
[16] *Ibid.*, p. 19.
[17] Cf. n.2.
[18] *Donoghue* v. *Stevenson*, [1932] A.C. at p. 619.

refers to such cases as *Pasley* v. *Freeman*,[19] *Lumley* v. *Gye*,[20] and *Winsmore* v. *Greenbank*,[21] but it is more convenient to discuss these later. On the whole he seems to agree with Dr. Winfield's opinion that there is, has been, or will be a general principle of liability although he expresses these various views with considerable caution.

Dr. C. K. Allen's interesting article, *Legal Morality and the Ius Abutendi*,[22] is divided into two parts, each of which seems to express a different conclusion. In the first part he states the English law as follows: "Keep within the law, and you may gratify your malice to your heart's content. We have come to regard this principle as so indigenous to our common law that it is almost impious to question it."[23] He then points out that "our view is not shared by all our neighbours," and in a series of most useful illustrations he suggests that the results of these cases would probably have been different in French, Swiss, and Italian law in which there is a general principle of tortious liability. This part of the article seems to prove that English law lacks such a general principle. But in part two of his article Dr. Allen, apparently revolted by the harshness of the orthodox view, moves over to the side of the angels, for now he says, "And when the guiding principle is sought, it seems to lie between two alternatives—either (1) you may do what harm you please, provided you keep on the right side of the law; or (2) you shall not do damage, unless there is a reasonable excuse for it. Can it be doubted which of these two principles is inherent in the law of torts?"[24] With all respect, we believe that the answer is "Yes," if Dr. Allen is stating the second alternative as a principle of English law. To support this general principle he quotes what Lord Camden said in 1762, that "torts are infinitely various, not limited or confined." As additional authority for this principle he cites in a footnote Darling, J.'s, judgment in *Manton* v. *Brocklebank*.[25] Unfortunately the weight of Lord Darling's dictum is lessened by the fact that his judgment was reversed by the Court of Appeal. We believe that the various cases cited in the first part of Dr. Allen's article are more persuasive as showing that there is at the present time no general principle of liability for harm in English law.

Concerning the date of this general principle Dr. Allen leaves

[19] (1789), 3 T.R. 51.
[20] (1835), 2 E. & B. 216.
[21] (1745), Willes 577.
[22] (1924) 40 *L.Q.R.* 164. Republished in *Legal Duties* at p. 95.
[23] *Op. cit.*, p. 96.
[24] *Ibid.*, pp. 113, 114.
[25] [1923] 1 K.B. 406, 413.

us in some doubt. On page 113 he seems to suggest that it originated with the "Action upon the Case in the Nature of Trespass." On page 116 he states, if I understand him correctly, that this is a modern development owing to the rationalisation of the law during the nineteenth century, but on page 118 he shifts to hopes for the future when he says that the limited idea of wrongful conduct "will die hard in England; but the sooner we are able to pronounce life extinct, and follow it decently to the grave, the better, I believe, for English jurisprudence." The difficulty in joining with Dr. Allen in this desirable funeral procession is that Professor Winfield, whose theory we shall next discuss, tells us that the corpse has long since been buried and that as mourners we are centuries too late.

In Professor Winfield we find the leading protagonist of the general principle of liability theory, for he has dealt with it in greater detail than has any other writer.[26] Also he has stated it in broader terms than has Sir Frederick Pollock and has given it a far longer history. His theory is that "all injuries done to another person are torts, unless there is some justification recognised by law."[27] It follows that the Courts are free to create new torts whenever in their discretion they consider that this is desirable. This theory is supported by two chief arguments. The first is that some eminent Judges, both ancient and modern, have expressed this view. Thus Lord Camden said in 1762, "Torts are infinitely various, not limited or confined." This is the only dictum which completely supports Professor Winfield's theory as the two quoted from Bowen, L.J., are limited to wilful and intentional damage. Lord Mansfield's description of the action upon the case as "a liberal action" is hardly definite enough to support a general principle of liability.[28] Feeling perhaps that these four citations are hardly conclusive Professor Winfield calls in aid the unconscious thoughts of the Judges. "And I think," he says, "that if we look at what the Judges did, and not merely at what they said, we might reasonably infer that they were acting on the idea that all unjustifiable harm is tortious. The idea was usually subconscious, and though, as we have seen, some distinguished Judges have given voice to it, others perhaps would not have admitted it."[29] This attempt to prove the existence of a fundamental principle of law by analysing

[26] He has discussed it in *The Law of Tort* (1937), *The Province Of The Law Of Tort* (1931), and in (1927), 27 *Columbia L.R.*, 1, in an article entitled "The Foundation Of Liability In Tort."

[27] *Law of Tort*, p. 15.

[28] *Gardiner* v. *Croasdale* (1760), 2 Burr. 905, 906.

[29] *Law of Tort*, p. 20.

the subconscious thoughts of the Judges is undoubtedly an interesting experiment, but it falls somewhat short of conclusive evidence. All we can say is that, with the exception of Lord Camden, they seem to have succeeded pretty thoroughly in suppressing their subconscious.

But even when conscious the Judges may, according to Professor Winfield, have been silent for cautionary reasons. "The Courts," he says, "have full power to create new torts (or more consistently with judicial caution) to extend the law of torts without any baptismal ceremony for each extension."[30] This metaphor is a dangerous one, for is it not possible to suggest that the reason why the Judges have so cautiously avoided any baptismal ceremony is because they doubted the legitimacy of these new torts? Why have they hesitated to acknowledge their paternity if they had the right to create them? Here is the crux of the question we are discussing, for if Professor Winfield is correct in his view, then we ought not to be surprised to find a Judge of to-day saying, "In this case I find it necessary to create a new tort." But up to the present no Judge seems to have adopted this obvious course.

Professor Winfield's second argument is based on the incontrovertible fact that the law of torts to-day is wider than it was one hundred and fifty years ago. New torts have been created to which specified names have been given. This must prove according to him that the Courts assume that they have the right to create new torts. But does it? No one can deny that the Courts have created new torts by the gradual and sometimes almost imperceptible extension of old torts, but this differs fundamentally from the view that they have the right deliberately to create new ones based on a general principle of liability. It may be said that this is only a question of degree, but in law questions of degree may be indistinguishable from questions of kind. An analogy may make this clearer. Before taking a house near the sea for this summer I consult Professor Smith, the eminent scientist, who warns me that the sea will wash the house away. Later it transpires that what he meant was that by gradual erosion the sea would wash away the land in one hundred years. His advice, although interesting, can hardly be described as helpful. Similarly, if a litigant consults his legal advisers to-day as to whether or not he has a cause of action he wishes to know what his rights will be when the action is tried within a few months. He will not be interested in the suggestion that if he brings a similar action in fifty years the judges by a gradual series

[30] 27 *Columbia L.R.*, p. 1.

of cases will probably have created a new tort which will cover his facts. What has been the process in the law of torts? Has it been a modification of the law by a process of erosion and accretion, as we believe, or by a consciously creative act in accordance with a general principle of liability as suggested by Professor Winfield? Here we can take his first modern illustration—the tort of deceit. Of this Professor Winfield says, "The Court in *Pasley* v. *Freeman* were convinced that they were creating a new tort."[31] But in that case Ashhurst, J., said: "Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance: but where the case is only new in the instance, and the only question is upon the application of a principle recognised in the law to such new cases, it will be just as competent to Courts of Justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago."[32] Nor can we find in the judgments of Lord Kenyon, C.J., and of Buller, J., filled to the brim as they are with the citation of precedent cases, any suggestion that they thought that they were creating a new tort. From deceit we turn to negligence which according to Professor Winfield became a distinct tort somewhere in the neighbourhood of 1820–1830. So vague an attribution does not suggest any clear act of creation, especially as a century later there is still some doubt concerning the existence of this tort. The next illustration is *Rylands* v. *Fletcher*,[33] in which according to Professor Winfield the old liability for cattle trespass received "enormous extension." But if we study Lord Cairns, L.C.'s, judgment in which he cites that of Blackburn, J., in the Court of Exchequer Chamber we can see that neither he nor Blackburn, J., thought that they were creating a new tort. Where is there any suggestion in the following words, unless it is deeply subconscious, that the law is being altered: "And upon authority this we think is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches"? Finally, Professor Winfield finds a new tort in *Brooke* v. *Bool*[34] and in

[31] *Law of Tort*, p. 400, n.(*f*).

[32] (1789), 3 T.R. at p. 63.

[33] (1868), 3 H.L. 330, 340. This case incidentally illustrates the danger of putting too much weight on dicta concerning general principles of liability, for Lord Cranworth said in his judgment (p. 341): "For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound *sic uti suo ut non laedat alienum*." If Professor Winfield had chosen this dictum, instead of Lord Camden's, on which to base his general principle of tortious liability, he could have proved that the common law was founded on the doctrine of absolute liability. He would thus have been able to prove its descent from Anglo-Saxon times, instead of having to begin with the Statute of Westminster II.

[34] [1928] 2 K.B. 578.

Honeywill & Stein, Ltd. v. *Larkin Bros. Ltd.*,[35] but if the judges who decided those cases were basing this supposed tort on any general principle of tortious liability, they seem to have been singularly successful in concealing their intention. In the latter case the judgment of the Court of Appeal was read by Slesser, L.J.; it is hardly likely that he was thinking of Professor Winfield's principle, as two years later in his book *The Law* the learned Lord Justice said: "Whether a particular remedy does, or does not, exist for a wrong done to another is often a matter of historical accident, for the law of torts is not based upon principle, but depends upon the presence or absence of prescribed remedies, and since the sixteenth century the remedies have been defined and limited. It has been stated that there now exists a general duty not to do wilful harm, but it is difficult to find any support in English law for this very general proposition. . . . Despite dicta to the contrary, I think it would be going too far to say that there is a remedy for every wrong. Of course, if by wrong is meant that for which the law provides a remedy, the question answers itself, but if a greater extension be given to the word 'wrong,' then, I fear, it must still be confessed there are many wrongs for which the law provides no remedy."[36] Thus Professor Winfield in citing the *Honeywill* case as an illustration of his general principle does not seem to have been particularly happy in his choice. Other cases besides those mentioned above are referred to by Dr. Winfield, but it would unduly lengthen this article to discuss each separately. He suggests that these cases prove that new torts may be created by the Courts in accordance with the principle that all unjustifiable harm is tortious: we believe that they illustrate the more limited proposition that existing torts tend gradually to expand through judicial interpretation as new instances are brought within their purview.[37]

One further point raised by Dr. Winfield may be mentioned here. He says that, "Investigation appears to show that our

[35] [1934] 1 K.B. 191.

[36] Pp. 146–147.

[37] In his classic work *Foundations of Legal Liability*, T. A. Street discussed some of the cases cited by Professor Winfield. Apparently he did not take the view that the judges in these cases were consciously creating new torts, for he said (Vol. I, p. 343): "The dissenting opinion of Coleridge, J., in *Lumley* v. *Gye* (1855), like the dissenting opinions of Cockburn, C.J., in *Collen* v. *Wright* (1857), and of Grose, J., in *Pasley* v. *Freeman* (1789), is exceedingly instructive, for it brings into clear relief the fact that the decision of the majority embodied a radical extension of legal doctrine, not to say an actual departure from former precedents. Nothing better illustrates the process by which the law grows. That situation which to one judge seems to be only a new instance falling under a principle previously recognised, will to another seem to be so entirely new as not to fall under such principles. It will not infrequently be found that the judge of greatest legal acumen, the greatest analyser, is the very one who resists innovations and extension. This, indeed, is one of the pitfalls of much learning."

courts have not sent away a plaintiff empty handed in any action in general, or in any action in tort in particular, simply and solely, because the action was a new one."[38] This is easily understandable, for there does not seem to be a single case in which counsel has based his argument on Professor Winfield's fundamental general principle. It is interesting to find that this general principle of liability has not, as far as we can find, been used even as a make-weight in doubtful cases. *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor*[39] is a useful illustration of this. The defendant erected a tower on land adjoining the plaintiff's racecourse from which he sent broadcast reports of the results of the races. As this affected the plaintiff's profits he brought an action which was based on the grounds of nuisance and of breach of copyright. He lost because he could not establish that the defendant's act was a nuisance within the meaning of the law. Although counsel for the plaintiff in this case must have known that he was waging an almost forlorn battle, he apparently made no attempt to argue that the Court should create a new tort because his client had been injured without justifiable excuse.

Professor Winfield explains the absence of any references to his general principle on the ground of judicial caution, but as a general rule neither the Courts nor counsel are afraid of generalisations. We all know how frequently Ashhurst, J.'s, misleading statement "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it,"[40] has been cited as a last hope. The remarkable thing, therefore, is not that the Courts have failed to deny the existence of a general principle of liability, but that no counsel, even in a desperate case, has had the temerity to present this argument. It will be interesting to see what happens when the coming generation of lawyers, who have been so ably taught by Professor Winfield, first advance this theory in Court.

Finally on the question concerning the date of this general principle, Professor Winfield differs from Sir Frederick Pollock's view that it is of modern origin. "From Statham and Fitzherbert to Blackstone the evidence is all the other way, and Blackstone himself is markedly in favour of a general liability in tort, and so were his contemporaries, Pratt, C.J., and Lord Mansfield."[41] It is strange that this general liability in tort, which apparently has existed for over six hundred years, should have had to wait until the twentieth century for recognition and systematic formulation.

[38] (1927) 27 *Columbia L.R.*, 1.
[39] 1938, *The Times* newspaper, 21st January, p. 4.
[40] *Lickbarrow* v. *Mason* (1787), 2 T.R. 63.
[41] 27 *Columbia L.R.*, p. 5.

Having discussed seriatim the theories of Pollock, Stallybrass, Allen and Winfield, it is now time to tabulate our criticisms of the "general liability" principle.

1. There is no agreement concerning the nature of this general principle. Pollock says that it covers "wilful harm," but Winfield believes that it includes all harm.

2. There is no agreement concerning its origin. Winfield takes it back to the thirteenth century, Pollock says that it is modern, Allen believes that it is still to come.

3. If this convenient general principle really does exist we might have expected to find hundreds of references to it in doubtful cases, but Winfield cites only one dictum which is directly in point.

4. This theory is based on a misinterpretation of the judicial process. It suggests that in such cases as *Pasley* v. *Freeman*, *Lumley* v. *Gye*, and *Rylands* v. *Fletcher*, the Courts were consciously creating new torts when in fact they thought that they were bringing in new instances under established principles.

5. If this theory were correct then much of the learning in tort law ought to be concerned with the nature of excuses and of justification. No textbook has, however, discussed these at any length, and in fact they are not even mentioned in the index to Professor Winfield's book on Tort.

6. Although the theory is innocuous in practice as no counsel seems ever to have based an argument on it, it has its dangers from the scholastic standpoint. The difference between such cases as *Mayor of Bradford* v. *Pickles*[42] and *Hollywood Silver Fox Farm Ltd.* v. *Emmett*[43] cannot be explained on the ground that in the *Bradford* case the defendant had a common right to dig in his own land, but that in the *Hollywood* case he did not have a common right to shoot over it. The real distinction is that in the *Bradford* case the defendant was not violating any recognised right of the plaintiff's, while in the *Hollywood* case he was committing a nuisance.[44] It is as necessary therefore to-day as

[42] [1895] A.C. 587.

[43] [1936] 2 K.B. 468.

[44] Professor Winfield in 27 *Columbia L.R.*, p. 11, explains *Mayor of Bradford* v. *Pickles* on the ground of common right: "The plaintiff's grievance was that malicious excavation by the defendant of his own land intercepted the percolation of water to the plaintiff's land. But this he was lawfully entitled to do because he was held to be merely exercising the right of every landowner to dig as deeply as he likes." This interesting explanation of the case seems to have been subconscious as far as their Lordships were concerned, for they emphasised the point that the plaintiff had no cause of action because he could not establish that any right of his had been violated. Thus Lord Halsbury, L.C., said at p. 594: "If this question were to have been tried in old times as an injury to the right in an action on the case, the plaintiffs would have had to allege, and to prove, if traversed, that they were entitled to the flow of the water, which, as I have already said, was an allegation they would have failed to establish."

it was a hundred years ago for the student to realise that a plaintiff cannot recover merely because he has been unjustifiably injured by the defendant: he must still prove that some specific right has been violated. However desirable it may be to have a general principle in the law of torts, it is, we believe, a case of wishful thinking to say that it exists at the present time.

A. L. Goodhart

LAW REVISION

THE law Revision Committee was appointed on 10th January, 1934, "to consider how far, having regard to the Statute Law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the Committee require revision in modern conditions." Since that date the Lord Chancellor has referred several problems to the Committee which has from time to time published reports upon them. The results of these reports up to the present are seen in two statutes, the Law Reform (Miscellaneous Provisions) Act, 1934, and the Law Reform (Married Women and Tortfeasors) Act, 1935. These two Acts have incorporated the recommendations contained in the first four reports of the Committee dealing with the following points—

(*a*) the doctrine of no contribution between tortfeasors;

(*b*) the legal maxim *actio personalis moritur cum persona*, and the rule that "in a civil court the death of a human being could not be complained of as an injury."

(*c*) the liability of a husband for the torts of his wife;

(*d*) the state of the law relating to the right to recover interest in civil proceedings.

The legislation passed as a result of the labours of the Law Revision Committee has proved almost entirely successful. The purpose of this note is to indicate those limited grounds on which criticism can be made, though even here criticism is by no means unanimous, and is on the whole directed to small and relatively unimportant matters.

The first interim report of the Committee contained recommendations upon the legal maxim *actio personalis moritur cum persona*, and under this head the Committee examined the Common Law rule known as the rule in *Baker* v. *Bolton* (1808), 1 Campbell 493. This rule is that no one can maintain an action against a person who by his wrongful act, neglect or default has caused the death of another, and it was approved of by the House of Lords in s.s. *Amerika*, [1917] A.C. 38. The rule has long been the object of criticism, and it was made the more anomalous by the decision in *Jackson* v. *Watson*, [1909] 2 K.B. 193, which laid down that it did not apply to cases of breach of contract.

The Committee dealt with all the criticisms of the rule and finally recommended that it should be abolished. This recommendation was not, however, incorporated in the Reform Act, 1934. In fact, s. 1. (2) (*c*) of the Act seems to reaffirm the rule

with the express exclusion of claims for funeral expenses. It does appear unfortunate that the recommendations of the Committee were not acted upon, especially since the rule in *Baker* v. *Bolton* is largely inconsistent with the effects brought about by other provisions of the Act, and the hope may perhaps be expressed that this matter will receive attention upon the passing of the next Law Reform Statute.

A decision under the 1934 Act which has aroused very great interest is that of the House of Lords in *Rose* v. *Ford*, [1937] A.C. 826. Since there was a note on this case and on that of *Flint* v. *Lovell*, [1935] 1 K.B. 354 in a previous issue of this Review, it is unnecessary to recapitulate the facts or the reasons given by the Courts for their decisions. Nor is it within the scope of this Note to deal with the question of whether the results of the *Rose* v. *Ford* decision are desirable. What must be pointed out is that the Law Revision Committee cannot be held responsible for the case of *Rose* v. *Ford* for two reasons.

In the first place, it seems almost certain that the possibility of such claims did not present itself to the Committee. The case of *Flint* v. *Lovell* was not decided until after their report, nor, indeed, until after the passing of the resulting statute. It is true that such cases as *Phillips* v. *London and South Western Railway Company* (1879), 5 Q.B.D. 78 had hinted that "loss of expectation of life" might be a ground for damages, but the doctrine obtained no real significance until the decision in *Flint* v. *Lovell*.

Secondly, though not expressly stated in the Committee's Report, it is, I think, clear that the Committee did not intend that the estate should recover for pain and suffering caused to the deceased. In paragraph 12 the Committee recommended that the system of Lord Campbell's Act should be retained, but that the Act should be amended to cover a wider range of beneficiaries and a wider range of damages. In paragraph 13 the Committee explained this by saying that the damages should be in proportion either to the loss to the estate, or to the losses to the dependants, or, in certain cases, to both heads of loss together. The Act, on the other hand, in s. 1 (1) and (2), by the general way in which they are expressed, allows the recovery of damages by the estate for the pain and suffering suffered by the deceased. As decided in *Rose* v. *Ford*, it also allows damages for shortening of expectation of life. Both these results seem to be contrary to the Committee's recommendations, since they cannot be brought either under the head of loss to the estate, or of loss to the dependants. If the rule in *Baker* v. *Bolton* is to be considered, it would seem an appropriate occasion to bring the Law Reform

(Miscellaneous Provisions) Act more into line with the Committee's proposals. It is anomalous and against the whole conception of the Common Law to compensate a person who has not suffered. The argument that because it is cheaper to kill a person than to maim him is therefore unjust, is based on fallacious reasoning. The test ought to be the damages suffered by the claimant. Again, if damages for pain and suffering of the deceased are to be paid to the estate, what logical principle is there for excluding exemplary damages? This seems to be merely capricious.

Two small points arise as a result of s. 1 (1) of the Act. This section expressly excludes actions for defamation and seduction from its benefits. The fact that the estate of a defamed person cannot sue in respect of that cause of action has been criticised on the ground that defamation may do much more harm to the next of kin than an assault, and it does appear that there is something to be said for this view.

With regard to the exclusion of actions for seduction, a difficulty may arise as to the use of the word "seduction," because it is not clear whether this term is meant to include actions on the principle of *Lumley* v. *Gye* (1853), 2 El. & Bl. 216. The action of seduction is applicable to all cases where a servant is tampered with by a third party, and has not the restricted meaning usually attributed to it in ordinary speech.

Another curious position is produced by s. 1 (2) (*b*) of the 1934 Act. This section enacts that damages recoverable for the benefit of the estate of a deceased person "in the case of a breach of promise to marry shall be limited to such damage, if any, to the estate of that person as follows from the breach of promise to marry." This subsection was incorporated as a result of the following recommendations of the Committee—

> "The anomalous case of action for breach of promise of marriage should be treated like any other claim in contract, but the damages should continue to be limited to such special damages as can now be recovered. (See *Finlay* v. *Chirney* (1888), 20 Q.B.D. 494, and *Quirk* v. *Thomas*, [1916] 1 K.B. 516.)"

The old law as contained in these two cases and in *Chamberlain* v. *Williamson* (1814), 2 M. & S. 408, was not very certain or definite, but at least until the decision in *Quirk* v. *Thomas* the rule seems to have been that in such a case the executors could only sue or be sued to the extent to which special damage had been done to the estate of the deceased or to the plaintiff respectively. Even this was doubted in *Quirk* v. *Thomas* when Swinfen

Eady, L.J., expressed an opinion that no claim for special damage would lie against the deceased's estate, and the other judges seem to have been uncertain on this point, which did not actually have to be decided for the purposes of that case.

The position as a result of the 1934 Act is that where the wrongdoer dies, his estate is liable to the full extent of the damages for which he would have been liable had he lived, whereas if the injured party dies his estate can only recover the loss which was suffered by the estate as a result of the breach of promise. It is possible that at some future date, a deceased man's personal representatives will bring an action against his *ex-fiancée* for damages suffered by his estate.

It seems very unlikely, and is in fact contrary to the terms of their recommendation, that the Committee intended to bring about this result and to do away with the Common Law rule as laid down in *Finlay* v. *Chirney*, and it seems inequitable that the wrongdoer's estate should have to pay full damages while the injured party's estate can only recover special damage suffered by it. It appears anomalous that if the two parties concerned in a breach of promise of marriage die within six months of the breach, the estate of the wrongdoer is liable to the full extent of the damages for which he would have been liable had he lived, while the estate of the injured party can only in fact recover the special damage done to the estate itself.

Another interesting result is brought about by sub-ss. (4) and (3) (*b*) of s. 1 of the 1934 Act. Section 1 (4) reads as follows—

> "Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered."

Section 1 (3) is as follows—

> "No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless either (*a*) . . ., (*b*) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation."

Section 1 (4) is certainly artistically worded, but once the real meaning of the section is understood it appears to be a most equitable and sensible rule. However, some of the good that it is intended to do is negatived by s. 1 (3) (*b*).

Section 1 (4) of the 1934 Act was intended to cover such cases as subsidence where the damage and not the withdrawal of support constitutes the cause of action. So long as the subsidence and damage occur within six months of the taking out of representation by the personal representatives of the deceased wrongdoer its object is achieved. If, however, as may happen at any time, a man dies having during his life excavated his land, and, more than six months after his personal representatives have taken out representation, a subsidence occurs on the land of his neighbour causing damage, the neighbour will be without a remedy. He cannot sue the personal representatives owing to s. 1 (3) (*b*) of the 1934 Act, and he cannot sue the present occupier owing to the decisions in *Hall* v. *Duke of Norfolk*, [1900] 2 Ch. 493, and *Greenwell* v. *Low Beechburn Coal Co.*, [1897] 2 Q.B. 165.

The 1934 Act, by s. 3 (1) allowed the recovery of interest in any action for debt or damages, but provided that nothing in the section should authorise the giving of interest upon interest.

Section 3 (1) was included in the Act as a result of the second Interim Report of the Committee which recommended that the old Common Law rule established by Lord Mansfield in *Eddowes* v. *Hopkins* (1780), 1 Douglas 376, that interest cannot, in the absence of express agreement be recovered, should be altered. Proviso (*a*) was clearly inserted to prevent the possibility of a plaintiff being able to recover compound interest, but it appears, that as worded, this proviso goes considerably further than that, and where a plaintiff has a claim for a definite sum with interest he will only be entitled under this section to recover interest on the principal sum from the date when the cause of action arose and not upon the interest thereon which was also due to him.

This provision allowing the recovery of interest, has raised a considerable practical difficulty. Before the Act, the amount to be paid into Court in respect of a due debt could be calculated with exactitude; for where interest was due, the amount thereof was known. Now the Court has the discretion to give interest in all cases; the amount of the interest is not fixed, and the practitioner can only make a guess as to whether any, and if so what, interest will be awarded by the Court.

The second Statute passed at the instigation of the Law Revision Committee was the Law Reform (Married Women and Tortfeasors) Act, 1935, and was the result of their third and

fourth Interim Reports. If husbands are really to be independent, it might be said that the special rules as to agency from cohabitation, or at any rate from necessity, were inconsistent with that principle. However, it seems as if the institution of marriage should reasonably be expected to raise the presumption of agency in both these cases.

The second part of the 1935 Act deals with proceedings against, and contribution between, tortfeasors, and its primary object was to abolish the old Common Law rule that no contribution obtained between joint-tortfeasors laid down by Lord Kenyon in *Merryweather* v. *Nixan* (1799), 8 T.R. 186.

There are at least two interesting points which arise as a result of this part of the Act and which seem to require some explanation.

Section 6 (1) of the Act is as follows—

> 6 (1) "Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> (*c*) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

The following case recently came before the Court. A cross-road collision occurred between two cars and the Judge held that each of the drivers was negligent and contributed to the accident. The first driver had his wife in his car with him and the second driver was alone. The wife sued the driver of the second car and recovered substantial damages for personal injuries which she had suffered in the collision. The second driver thereupon claimed contribution under the above s. 6 (1) (*c*) of the 1935 Act from the first driver, but it was held that he was not entitled to it, since a wife cannot sue her husband in tort and therefore the first driver was not "any other tortfeasor who is, or would if sued have been, liable in respect of the same damage."

A very similar case recently resulted from the collision of two ships, where the Court held that both were partly to blame. Several members of the crew of one ship were drowned and claims were made by their dependants under the Fatal Accidents Act against the owners of the other ship. The position seems to be that the owners of the second ship are liable as tortfeasors at

Common Law, but are not liable under the Workmen's Compensation Act. The owners of the first ship are liable under the Workmen's Compensation Act, but have the defence of common employment to any Common Law claim. The rule in Admiralty as to apportioning blame does not apply to claims under Lord Campbell's Act. It seems that if the dependants of the deceased members of the crew of the first ship obtain damages against the owners of the second ship, the latter will have no claim for contribution against the owners of the first ship. The first ship is not a tortfeasor, for it has been frequently decided that liability under the Workmen's Compensation Act is not tortious and therefore the owners of the first ship are not persons "who would if sued have been liable as a joint tortfeasor in respect of the said damage." If an action for the alleged tort were brought against the first ship by members of its crew the action would fail, and therefore as regards its crew that ship cannot be a tortfeasor.

The other point arising from this part of the 1935 Act appears as the result of s. 6 (1) (*a*). This is as follows—

> 6 (1) "Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> (*a*) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage."

This section was, of course, inserted to abolish the old Common Law rule found in the case of *Brinsmead* v. *Harrison* (1872), L.R. 6, C.P. 584, to the effect that judgment against one tortfeasor was a bar to actions against the others. This section does not alter the rule in *Duck* v. *Mayeu*, [1892] 2 Q.B. 511, to the effect that the release of one joint tortfeasor releases all the others. The reason for this rule was explained by A. L. Smith, L.J., in his judgment in that case. He said (p. 513): ". . . the cause of action which is one and indivisible, having been released, all persons otherwise liable thereto are consequently released." As this rule is founded on a principle which is no longer accepted by the Law it would, perhaps, be advisable that the rule in *Duck* v. *Mayeu* should go the same way as that in *Brinsmead* v. *Harrison*.

It is hoped that at any rate most of the grounds on which the two Law Reform Statutes are open to criticism have been dealt with in this note. That these grounds are so few and so limited in scope shows how thorough the work of the Committee has been. The only grounds of any moment on which it is possible

to criticise the process of Law Reform up to the present time are these—

(1) The fact that the rule in *Baker* v. *Bolton* has been retained. As has been pointed out, this was against the express recommendation of the Committee.

(2) The decision in *Rose* v. *Ford*. It is difficult to say whether or not this is a ground for criticism at all, but, in any event, no responsibility for it can be attributed to the Committee.

(3) The fact that full damages for breach of promise of marriage can be obtained against the estate of the deceased wrongdoer. This will probably in fact have very small results.

It is a spirit of caution on the part of the draughtsman which has resulted in the Common Law being insufficiently altered, and which is responsible for almost all the defects to which attention has been called. For this reason those defects are mainly of a very minor and unimportant nature. During the short period of its existence the Law Reform Committee has very materially improved those branches of the law with which it has dealt by removing those anomalies and injustices which inevitably arise during the gradual evolution of any legal system. It is safe to say the great majority of lawyers and laymen hope that the recommendations contained in their later reports, and especially those dealing with the Statute of Frauds and consideration, will soon find a place in the Statute Book.

JOHN FOSTER

Note. Mr. Foster is the secretary of the Law Reform Committee. His article shows that the main failings of the recent legislation have been due to the failure of the Parliamentary draftsman to comply exactly with the proposals of the Committee. This we suggest could be remedied by the reference back to the Committee for its consideration of the draft bill before introduction in Parliament.

R. S. T. C.

A PLEA FOR UTILITARIANISM[1]

Part I

IT is well known that "Jurisprudence" is a peculiarly English subject. Though the word itself is of Latin origin it cannot be translated into any other language. "Philosophy of law," "theory of law," "judicial sociology," are not equivalents. The cause lies in certain peculiarities of English legal development. The most important is that there was until Blackstone an almost complete absence of scientific treatment. The law was taught as a profession by the Inns of Court and of Chancery. Lawyers, like surgeons, learned by the clinical method, and most of the books which they read were aimed at purely practical objects. Though the influence of Roman Law on the categories of the law of England was, in the formative period, obviously substantial, the later English lawyers lost touch with the comparatively scientific methods of the Roman jurists and ignored the studies of the pandectists until Austin rediscovered them. English philosophers both before and after the Renaissance dealt with the underlying problems of the law; the English Scholastics, Hobbes and Locke, to name the most eminent, had enormous influence upon the development of political ideas in Europe. In the "Golden Age," indeed, lawyers such as Sir Thomas Smith, Sir John Fortescue, and, above all, Francis Bacon, contributed substantially to the advancement of legal learning. But at the end of this period the lawyers went back to practice. By the end of the eighteenth century English law was, as Carlyle said of Coke's learning, shovelled up in vast disorderly heaps. The practitioners, founding themselves upon Coke, had made of it a highly artificial and pedantic collection of rules almost entirely without connection with the social problems that they were intended to solve.

It is much to Blackstone's credit that he made this jumble of past expedients look almost intelligent. His legal theory was confused and jejune and was copied without much effort of imagination from such continental theorists as Burlamaqui, with indigested chunks of Hobbes and Locke. As such, it was rightly held up to scorn by Bentham. Blackstone collected learning of the more theoretical kind much as a modern lawyer might if he dug about in a few philosophical works without understanding even the nature of the problem and served up the results to even

[1] No one is more aware than the writer that the methodology of Jurisprudence and its relations to the other social sciences requires a whole book for its proper treatment. The remarks which follow do not pretend to be adequate, but they may indicate a few possible lines of thought.

more ignorant students. But legal theory was not Blackstone's sphere of influence. Blackstone's great contribution was, as Bentham himself said, that he first made English law speak the language of the scholar and gentleman. He did not merely collect the rules of the law; he digested and synthetised them. He turned them from a mass of disconnected rules into a system of law. He realised in the process that many of them were nonsense; but, above all, he enabled students of wider vision to realise that there was even more nonsense than he thought. Bentham without Blackstone was inconceivable. Until Blackstone the logical analysis of law which is now a commonplace of our books had not been attempted. By getting rid of mumbo-jumboism he made scientific examination possible.

The *Commentaries* are not a work of Jurisprudence but a systematic survey of English law. The introductory chapters do contain some theoretical material. But these received the full weight of Bentham's much heavier guns, and they can no longer be regarded as any contribution to legal theory. The creation of Jurisprudence as we know it was the work of Bentham. His object was not to expound law but to reform it. Law is but a means to an end, not an end in itself. It is the means by which many of the purposes of social life are attained. It was therefore necessary for him to consider the purposes of social life, to develop a philosophy. This philosophy was a particular kind of hedonism which he took from Hume. Its foundations are expounded in *Principles of Morals and Legislation*. The details of its application to various parts of law and legal administration are contained in the eleven volumes of Bowring's collection and, perhaps, in the manuscript material in University College, London. The theory itself, "the principle of utility," was expounded and corrected by John Stuart Mill in *Utilitarianism*. The practical examination of the law was left to the reformers of the nineteenth century.

Bentham was so full of ideas and so anxious to expound them that he rarely rounded off his works. *Principles of Morals and Legislation* comes to an abrupt end. The last section of the last chapter is headed "Jurisprudence, its branches." It is from these half-a-dozen pages that Jurisprudence takes its origin. The section ends by propounding certain questions: what is law? into what branches can it be divided? what is the meaning of *criminal* as applied to law? These Bentham proposes to discuss; but the book comes suddenly to a full stop. A long footnote, added nine years later, discusses shortly the nature of law. There was, nevertheless, enough in the few pages to form the basis from which his disciples developed the subject of Jurisprudence.

"Jurisprudence," Bentham tells us, means nothing by itself. It must have an adjective. A book of jurisprudence can have but one of two objects, to ascertain what the law is, or to ascertain what it ought to be. In the former case it is a book of *expository* jurisprudence; in the latter case it is *censorial* jurisprudence or, in other words, the art of legislation. A book of expository jurisprudence is *authoritative* if it is composed by a legislator who, by stating what the law is, causes it to become law. Any other book is *unauthoritative*. But a book may state either the laws of all nations or the law or laws of one or more separate nations. The former is a work of *universal* jurisprudence, the latter a work of *local* jurisprudence. But the laws of nations differ both in substance and in form. Moreover, the languages which nations use are so different that they rarely have a single word in common. "However, among the words that are appropriated to the subject of law, there are some that in all languages are pretty exactly correspondent to one another: which comes to the same thing nearly as if they were the same. Of this stamp, for example, are those which correspond to the words power, right, obligation, liberty, and many others."

It follows that if books treat of universal jurisprudence their subject-matter must lie within very narrow limits. If they are expository they can treat only of the meaning of words; they must be confined to terminology. The greatest opportunity lies in the field of censorial jurisprudence. For though the laws of different nations ought not to be the same, there are some leading points which ought to be the same in the laws of all civilised nations. These points were to be the matters discussed in the book. They are in fact discussed in many of Bentham's works; but *Principles of Morals and Legislation* stops short a few pages later. We need not now discuss those few pages; we need note only that Bentham regarded "the history of jurisprudence" (i.e. legal history) as furnishing examples for the art of legislation, and that in the footnote already mentioned he laid down the definition of "law" (taken from Hobbes) which Austin later adopted and elaborated.

Enough has been said to show that Bentham made a clear distinction between the law that exists and the law that ought to be. With Austin, as we shall see, "Jurisprudence" became what Bentham called "expository jurisprudence." "Censorial jurisprudence," which deals with the law that ought to exist, becomes the art of legislation. The idea underlying the distinction is that the law can be something precise and definite and that it is possible to separate clearly between law and justice or morals.

Bentham would not have said that the law which Blackstone expounded was either precise or definite; his idea was that an intelligent system of law would be precise and definite. It was the idea possessed by those who a little later demanded in France a clear and definite code which should enable any man, without the aid of lawyers, to understand what the law was.

James Mill, who wrote the article on "Jurisprudence" in the fifth edition of the *Encyclopaedia Britannica* did not confine himself to expository jurisprudence, but dealt with such matters as the theory of punishment. James Mill no doubt influenced Austin, but it is to Austin himself that we owe the nature of English Jurisprudence. On his appointment as Professor of Jurisprudence at University College, London, Austin went at once to Germany. Professor Andreas B. Schwarz has described the state of German legal studies at that time.[1] "It was," he said, "in a state of transition, which can be roughly described as the transition from natural law to the historical school." But natural law was not in the Benthamite philosophy. It may be said without much exaggeration that after Bentham's *Fragment on Government*, natural law in England was not only dead but damned. Nor was the historical school likely to appeal to a utilitarian whose master thought that "the history of jurisprudence" was useful for the art of legislation but no more. There are romantic elements in Austin which Bentham would have described as stuff and nonsense, but in the main the pupil follows the teaching of his preceptor. Consequently, what attracted him in the German literature was not the legal philosophy or legal theory, but the systematic exposition of Roman law. Professor Schwarz shows that Austin's first and main studies were German textbooks of Institutes and Pandects.

So, Austin's *Jurisprudence* consists of two parts. The first is a long and detailed analysis of the nature of law and its relation to the principle of utility and the law of God. The result is stated both at the beginning and at the end. Law properly so called satisfies the definition which Bentham took from Hobbes. The assumption here was that there was something which, for a lawyer at least, could properly be called law. Hobbes did not merely define law, he justified it. He showed that sovereignty arose out of a state of nature by means of a social contract; and law was the product of sovereignty. In other words, to use modern terminology, he validated law by a quasi-philosophical, quasi-sociological argument. With Austin there was no argument and no attempt at justification. His purpose was to define. He

[1] *Politica*, Vol. I, pp. 181–92

assumed, that is, that there is something definite and precise called "law," and that it was his business to separate the proper and the improper uses of that term.

The same method was adopted and the same assumption underlay the second part, which consisted of an "analysis of pervading notions." These are notions implied by the words like persons, things, acts, rights of various kinds, forbearances, duties, injuries, liabilities, and so on. Austin did not make clear whether he was analysing conceptions employed in law or whether he was analysing social conceptions which it was the function of law to regulate. It appears that he was aiming at the latter and achieving the former. His analyses, in fact, were taken in the main from Roman law as expounded by his German authorities. His assumption was that he was analysing not Roman law but the social concepts themselves. The confusion persists to this day. Bryce and Dicey distinguished "legal sovereignty" and "sovereignty"; modern jurists distinguish between "possession in law" and "possession in fact"; but legal sovereignty and possession in law are rules of a particular system of law; they are not "universal" or "general" at all. The assumption of conceptual jurisprudence is that there is something universal or general.

Austin's influence has been enormous. He determined the essential nature of English jurisprudence. His method was followed by Markby and Holland in Oxford, by Sheldon Amos in London, and by Clark in Cambridge. Many of his definitions, especially his definition of "law," have been criticised. In the course of the criticism, it has been found that precision of definition is not particularly easy, and some of the later writers can be described not unfitly as flirting with philosophy and philandering with sociology. Even so, legal philosophy is still regarded with a certain contempt and "sociologist" is almost a term of abuse. The jurist of the Austinian school explains Austin's theory of law, and some of the attempted modifications. Having surmounted this obstacle, he proceeds with relief to his main task, the elucidation of legal concepts. Here the method is again that of Austin, though later developments have considerably modified the matter.

This is, however, not the whole extent of Austin's influence. Generations of lawyers were inflicted with his close and meticulous analyses. In the meantime, Blackstone had eminent successors, and Bentham's disciples blacked out from the law itself some of the nonsense that Blackstone had, quite rightly, expounded. The new generation of writers on English law, a generation which

included Anson, Pollock, Dicey, Salmond and Westlake, applied to a somewhat more rational system of law the methods which Austin had developed. The law of contract and tort, as well as much commercial law and private international law, was expounded by lawyers who were in fact jurists. These eminent writers sought to understand the nature of the concepts which they expounded. In turn, their influence not only on the exposition but also on the practice of the law has been profound. They, and the lawyers taught by them, have made English law intelligible if not intelligent. The ordinary lawyer is in fact a jurist because he lisps in the language of jurists.

This development has been assisted by a development upon which emphasis must be placed. Austin's analyses of concepts were based on Roman law. Holland founded his *Jurisprudence* on the same basis; but gradually he introduced more and more purely English material. Salmond's *Jurisprudence* is almost entirely English in its content, though it contains frequent references to other systems, and especially to Roman law. The number of these comparisons alone distinguishes this book in the nature of its contents from any elementary introduction to civil law, such as Capitant's *Introduction à l'Etude du Droit Civil*. In other words, not only have English lawyers become jurists, but also the jurists have become English lawyers.

Another major development springs partly out of this cause and partly out of extraneous sources. Since Austin delivered his lectures the academic jurists have given great attention to the history of English law. The works of Maitland, Pollock and Holdsworth have made available a knowledge of the development of English legal ideas which would not have been available to Austin even if he had wanted to use it. It is possible to analyse English law without reference to history. In fact, however, so much of the law has no reason except history that no writer on English legal concepts would now think of omitting some historical explanations. This development, too, was assisted by the creation of "historical jurisprudence." This, in the hands of Maine, was a series of acute generalisations from inadequate material. In the hands of Vinogradoff it was either legal history or primitive law. The study of primitive law is undoubtedly of considerable use to the sociological jurist, for whom all facts (including all laws) are welcome. But the influence of this historical school in England has primarily been to emphasise that analysis is not complete without history. The English jurist is not a sociologist; he is a lawyer, but he has been taught that he cannot be a lawyer unless he is also a historian. For all law (except of course the

largest part of it which, being in legislation, tends to be ignored) is simply the scum left by the receding tide of history.

The best modern defence of the English school is contained in Dr. Allen's essay on "Jurisprudence—What and Why."[2] The author there discusses various definitions of Jurisprudence and criticises them in the light of modern historical and ethnological knowledge (which, strange to say, he ascribes to historical jurisprudence). "If that movement has taught us anything, it has put us on our guard against incautious generalisations concerning the universality and the permanence of legal institutions. The more we examine different civilisations at different periods, the more bewildering are the discrepancies"; and he quotes the statement of Mr. Justice Cardozo, that "hardly a rule of to-day but may be matched by its opposite of yesterday." Nevertheless, he does not admit that general Jurisprudence of the Austinian kind does not exist. "There are certain elements which are inherent in the very conception of law, considered as a phenomenon of social life, whatever the disparities in detail," and he proceeds to give examples. He is not, however, a sociologist; he is concerned not with these phenomena of social life but with the "principles" which result from them in the law. For him, Jurisprudence is "the scientific synthesis of the essential principles of law."

Neither the definition nor the examples quite explain whether Dr. Allen wished to emphasise the social phenomena or the legal solutions that various communities have developed to meet them. In similar stages of economic development and in similar political conditions both the social phenomena and the problems that arise for solution by means of law are much the same. But the possible solutions are infinite. "Ownership" as understood by English law may be entirely different from the meaning given to "ownership" in French law. What is common to England and France is the capitalist system which recognises private property and at the same time the possibility of State intervention to prevent the abuse of private property. In other words, the social phenomena are much the same, but there do not seem to be any "essential legal principles" flowing from them. Dr. Allen says: "There must be *persons* who are subject to law, and *things* which are objects of it. There must be certain fundamental relationships, such as ownership and possession, between these persons and these things." Persons and things are social phenomena, though it does not follow that these words have their exact equivalents in other languages. Nor does it follow that "persons" and

[2] *Legal Duties*, pp. 1–27.

"things," as used in the form of technical legal terms, mean the same in two systems of law. Out of them there spring no essential legal principles. "Ownership" and "possession" are either terms of ordinary language used to describe social phenomena, or technical terms used in rules of law. In the former case there are no essential principles of law; in the latter there will be rules of law but they are not essential.

The truth is, I think, that the element of "generality" is to be found only in the social phenomena. So long as the jurist restricts himself to positive law he can do no more than analyse the concepts of his own system of law, with or without the assistance of legal history, and with or without the assistance of comparisons drawn from other systems with which he is familiar. But a lawyer who does not analyse, who does not draw principles from the details of his branch of the law, is not a lawyer but a hack. Austin and his successors have done their work well. English lawyers have dropped back into the continental tradition, which received a new lease of life through the efforts of Saleilles, and have treated their subject as a science. There is, consequently, no place for a jurisprudence of concepts if by concepts is meant those actually embodied in the law. If, however, the jurisprudent deals with the social phenomena involved in law he is going outside the traditional English field; he is, in fact, becoming a sociologist. When, for example, the lawyer ceases to state the English rules of interpretation and seeks to find out how in fact judges interpret, he is analysing not law but a social phenomenon. Similarly, when he ceases merely to lay down the rules governing the operation of precedents and begins to ask himself what actually happens when the judge says that he is "following" or "distinguishing" a previous decision, he is examining the working of institutions and is in fact a political scientist or (what for present purposes is the same thing) a sociologist.

Other examples might be mentioned, but these suffice because both Dr. Allen and Professor Goodhart have made notable contributions in this particular field. Indeed, these writers have gone further. They have introduced the question of value; they have dared to criticise. There are, of course, precedents in the works of Austin, who discussed, for instance, the question of codification. But if we discuss the value of *stare decisis*, or rules of interpretation, or the merits of codification, may we not discuss also the value of the rules of substantive law? And if we discuss values are we not back not to analytical jurisprudence but to the art of legislation?

Part II

It might be thought that in returning to the art of legislation we might obtain assistance from modern legal theory. The primary problem which both legal philosophy and juridical sociology have to face is the problem of the validation of positive law. From what source is derived my obligation to obey the precepts of positive law? Hobbes and Locke had answers. Bentham and Austin had none, or, if they had, they assumed that I was compelled by superior force. The modern natural lawyers, too, have a clear answer, though they are not agreed as to the precise philosophical basis of natural law. They are divided even in their theory of knowledge; for whereas some, like Réglade, appear to accept the purely realist position adopted by St. Thomas Aquinas, others, like del Vecchio and Djuvara, try to answer the Cartesian thesis by a kind of neo-realism which is called, at least by the former, "inter-subjectivity." Divided as to the foundations of natural law, they are even less certain about its content; and while they dispute with Hauriou as to whether public order is or is not included within the concept of justice they can give little assistance in the practical application of the concept of justice to the details of the modern law. "Natural law with a changing content" seems even less capable of practical application; for it is just with the changing content that the science of legislation must be concerned.

The quasi-sociologists, like Duguit and Krabbe, are equally concerned more with foundations than with substance. Duguit thought that he was a realist but is accused by his critics of idealism. If law is founded on a sentiment of solidarity and a sentiment of justice, or on Krabbe's alternative, we are still faced with the problem of application; and we cannot in fact accept such a basis so long as it is denied by almost the whole school of legal philosophy. The historical school has asserted principles of historical development which are by no means universally accepted. At the same time, the careful analysis of social—or at least political—relations made by Gierke has at least demonstrated that the art of legislation must be founded on sociological investigation. In this way the historical school has brought Jurisprudence back to political science.

The Viennese School gives no assistance whatever. For even if Kelsen's "inverted pyramid" can stand on its apex after such criticisms as those of Carré de Malberg, it cannot be more than the blue-print of a political structure and tells us nothing about what the organs of government are to do. Kelsen becomes useful

for the art of legislation when, as in his work on democracy, he goes beyond his initial hypotheses and deals with "meta-juridical" political science.

These examples show that modern legal theory is still essentially concerned with fundamental problems. It is, of course, necessary that these problems should be investigated. Now that English Jurisprudence has, for practical purposes, repudiated the notion that the nature of law can be found by taking an *a priori* concept of the State and an *a priori* definition of "proper" law, it must deal with the theory of knowledge and the principles of political obligation. At the same time, it is not to be expected that agreement will be reached on these matters. The development of natural science proceeds apace in spite of the fact that most professional philosophers, at least in England, are neo-realists, while the few scientists who think about these problems are, apparently, jejune idealists. The ordinary natural scientist assumes that the matters with which he deals are real and that nature has an order. The "fact" that an apple hit Newton on the head and that apples have never been known to fly off to the moon does not prove either that the apple existed or that apples must necessarily fall to the ground. The scientist not only assumes these facts but develops laws to explain them, reserving to himself the power to develop other laws, or not to develop laws at all, if subsequently it can be shown by reason or revelation that he is wrong.

The problem of the social sciences is more complicated but in essence it is the same. The science of legislation must assume that men and things do exist and, since laws are intended to act on the will, it must assume also the doctrine of free-will. Jurists may be legal philosophers and dispute with philosophers the foundation of their assumptions; but they must also assist legislators in making "good" laws. It is here that the difficulty arises: for what is "goodness" but an ethical concept, our old friend justice in a new guise? Upon what basis may our ethics be based? Other branches of the social sciences have the same problem. When the economist says that the London passenger transport monopoly is economic or uneconomic he appears to be making a judgment of value; and values are questions for philosophers.[1] Even if he is not presuming the existence of strange people called "economic men," he is at least assuming that cheap and rapid transport is desirable.

It is not without significance that Bentham and John Stuart Mill were economists as well as political philosophers. Most of

[1] Cf. G. del Vecchio, *Law and Economics*.

the "classical" economists were utilitarians. Nor is it without significance that Bentham was among the few law-reformers who have had really considerable influence in reforming the law. The reason certainly is not that utilitarianism has met with the approval of philosophers. After the devastating criticisms of Bradley and others no reputable philosopher has been prepared to accept the Benthamite brand of hedonism. The real reason is that philosophers do not govern. Government is carried on by ordinary people for ordinary people, and the positive proposals which Bentham made seemed, in many cases, to be "reasonable." It may be true that pleasure and freedom from pain are not desirable, or the only things desirable, as ends; it may be true that one does not necessarily attain the greatest happiness for oneself by promoting the greatest happiness of the greatest number; Macaulay's famous jibe at Utilitarian arithmetic may be fully justified; nevertheless, the fact is that most ordinary people, and especially ordinary politicians, believe that what ordinary people want is the maximum of pleasure and the minimum of pain. A dictator who obtains the maximum pleasure by governing may find in Hegelian assumptions good reasons why he should not give his subjects the maximum of pleasure. A democratic politician has to be in practice a psychological hedonist.

Indeed, what other hypothesis would be possible, even if philosophers were kings? No honest philosopher can believe that he is right when so many other philosophers say that he is wrong. Dictators are not philosophers, and if they were the evidence suggests that they would not be honest. But if there were a dictator who was an honest philosopher, could he be so sure of the answer to Pilate's jest that he would allot to a man what he, the dictator, thought was good for him and not what he thought the man considered was good for himself? King Philosopher would surely say that there was no final proof that his truth was absolute and Mr. Smith's a delusion. This is, however, a hypothetical question, especially in a State which has already accepted the assumptions of philosophical radicalism by setting up a democratic machinery. The art of legislation in a democracy must necessarily be founded upon the principle of the greatest happiness of the greatest number.

The enunciation of a principle does not solve all problems. Bentham's eleven volumes do not say the last word on anything and fail to say the first words on many things. The primary question is always one of pure sociology, what in fact are the needs which people desire to be fulfilled. Bentham's sociology

was weak; and in any case the process of estimating and generalising needs is by no means easy. There are, too, physical limits within which alone needs can be satisfied. Then there arise questions of economics, of forecasting the extent of the prospective gains and of the expenditure, in the widest sense, required to attain them. There are, finally, questions of administration, including questions of legal administration with which the lawyer is particularly concerned. The variety of problems illustrates the unity of human knowledge and, above all, the interdependence of the social sciences. The Royal Commissions on the Poor Laws and on Sanitary Conditions, which were directly inspired by Bentham's secretary, Chadwick, had to call in a variety of experts. Jurisprudence, or the science of legislation as such, cannot directly be concerned with such problems. It can, however, examine the nature of legislation, of judicial interpretation, of enforcement of law, of the precautions to be adopted to prevent "injustice" in the utilitarian sense, and of those branches of the law with which lawyers are directly concerned, the ordinary civil and criminal law. The problems examined, for instance, by the Committee on Ministers' Powers, the Royal Commission on the Business of the Courts, the Law Revision Committee, and many other similar bodies, are essentially questions with which lawyers of wide enough vision are competent to deal. Such lawyers, too, may legitimately be called upon to expound the jurisprudential aspects of the wider social problems which involve the collaboration of many experts.

The lawyer does not understand the nature of his tools if he merely examines the technical concepts of his own system of law. Even if English law had a definition of ownership, which it has not, the jurist would not satisfy the calls legitimately made upon him if he did not realise that the nature of interests in property and their protection are social problems. Analytical jurisprudence has exhausted its vitality because it has concentrated on definition; and its present unpopularity is sufficient evidence of its present futility. It studies the bones of the law without the flesh that makes the law human. Legal theory, on the other hand, is necessarily enmeshed in metaphysical problems of the kind which must be examined but which do not admit of present social utility. In between lies a vast open field, hardly surveyed, and certainly not cultivated. It can be made fertile only by accepting the common assumptions upon which government is in practice founded.

The tools to be used are of the most varied character. Vast quantities of information are available now owing to the development of research in the social sciences and the needs of practical

administration. There are facts about the operation of the criminal law, for instance, which cannot be found in the statutes and the cases but which are readily available in the *Criminal Statistics* and the reports of many Royal Commissions and Departmental Committees. The problems of the criminal law clearly impinge, as for instance *McNaughton's Case* shows, upon the psychological and physiological sciences. Indeed, a little study shows the importance of the environmental factor and, therefore, of general social conditions. The interaction of the various influences stands out clearly in the Report of the President's *Commission on Law Enforcement*, but indications may be found even in such documents as the *Minutes of Evidence* of the Royal Commission on Betting and Lotteries.

This example shows some of the varieties of sources available. It overemphasises, however, the wider sociological element. The working of a legal system can best be studied in its own environment. The *Law Reports*, for instance, contain precious material, though they are even more important for what they do not contain. Above all, the jurist now has plenty of comparative material at his disposal. Maine's brilliant generalisations were based on inadequate data. The modern anthropologists, and especially the social anthropologists, have provided accurate material from a great variety of sources. Its very diversity is useful because it prevents over-simplification of the problems of law. At the same time, because it is concerned essentially with primitive social conditions, the elements of the situation stand out clearly. The chemist and the physicist deliberately create artificial conditions in which many ordinary factors are eliminated in order that they may study the reactions of a few factors. The jurist cannot experiment because he cannot create an artificial social environment. He can, however, find social conditions much more primitive than his own, and draw conclusions, for instance, about the nature of custom, the effects of sanctions, and the problems of public order, which, when allowance has been made for other factors, may be valid for his own social conditions.

Even more important is the comparative study of modern law. If the law progresses at all, it progresses through the interrelation of theoretical study and practical experience. Such interrelations are to be found in all modern systems; and, if the conditions be roughly the same, the experience of one may be made the experience of another. The study of foreign systems of law by the English lawyer may prove interesting but will not be fruitful unless conclusions can be drawn. The English lawyer who knows something of, say, French administrative law, is adding nothing

useful to knowledge unless he can draw conclusions applicable to his own system. Dicey used the right method, even if his conclusions be regarded as fallacious. The study of comparative law is not an end in itself but a means to the improvement of law and legal administration. Account must therefore be taken not only of the substance of foreign laws and of their methods of administration, but also of the circumstances in which they operate and their consequences in social life. What is sometimes called "comparative jurisprudence" has often been futile because it has not always realised that law is a social phenomenon which cannot be isolated from its background. Much of "comparative jurisprudence" consists in putting one definition or concept under another. It is, for instance, not very illuminating to be told that "possession" in English law means one thing and "possessio" in Roman law means another. This is the kind of observation to be found in the analytical text-books; but the correct answer is obviously "You don't say so." On the other hand, it may be useful to know why the two are different. The advantage of the study of Roman law is that its development through changing social and political conditions can be studied. Allowance has to be made for the alteration in circumstances, just as one must not apply to England without adequate consideration conclusions drawn from Melanesia. There may be dispute as to whether for modern purposes ancient Rome is more important than modern Melanesia, but both have lessons to teach.

All facts about law are of some interest to the jurist, though it is wise to repeat the platitude that some are more important than others. The whole jurist would take the whole of knowledge for his province. There is no such person; but every intelligent lawyer can contribute his quota from his special knowledge. The primary need is to take Jurisprudence out of the Austinian rut in order that there may be a few jurists of wide enough vision to survey some part of a vast territory. The contention of this paper is that this can best be done by developing that side of Bentham's work with which Austin was not much concerned.

IVOR JENNINGS

THIRD PARTY INSURANCE

COMPULSORY THIRD PARTY INSURANCE

IN his interesting article published in the previous number of the MODERN LAW REVIEW, Mr. Hector Hughes, K.C., criticises somewhat severely what he describes as a "series of important interferences with the contractual freedom of insurers in the name of injured third parties." In this regard he appears to be swimming against the general stream of modern social legislation and, as the question of principle is particularly well raised by the series of statutes relating to compulsory third party insurance with which he deals, it may be of interest to say something about the opposing point of view.

To deal first of all with Mr. Hughes's criticism on the narrowest ground, namely that it favours one section of the community as opposed to another, a close analysis of the actual facts of the situation hardly bears this out, at any rate on the grounds which he takes up. On the one side the Act confers a right upon citizens generally, a right which Mr. Hughes himself proves to be somewhat limited in its extent. On the other side it is true that it cuts down in some degree that complete freedom of contract which insurers have so far enjoyed. This, however, is at most a superficial burden because the financial obligations of the insurers are nicely calculated in accordance with their premium incomes, and if the obligations placed upon them by Parliament are found to be too onerous there can be no question that the insurance companies will quickly make provision to meet them by a general increase of premiums. In actual fact, however, by making third party insurance compulsory Parliament has presented to the insurers a substantial volume of new business, and this may well explain the comparatively small adjustment in regard to premium charges which followed the introduction of the legislation under discussion.

Assuming, however, for the sake of the argument that higher premiums will in fact be charged, Mr. Hughes may well argue that his thesis is correct because the motor car users are being made to pay extra in order to provide rights for the general population. On the face of it there is an element of truth in this proposition, but one must remember that motorists themselves are members of the general population and are equally, if not more, exposed to those risks of personal injury for the monetary compensation of which the legislature has aimed to provide. It should always be remembered that it is a considerable privilege to be allowed to use a dangerous object such as a motor car upon the highway, and that, indeed, there was a distinct tendency in the earliest cases to treat a motor car as a nuisance which its owner brought on to the highway at his own risk. To insist, therefore, that all motorists should take an elementary precaution to protect those who may be injured through their carelessness—a precaution which already before 1930 probably ninety-nine out of every hundred motorists were taking—can only be regarded as an injustice in the language of hyperbole.

There is of course a much wider ground upon which Mr. Hughes's attitude may be challenged. To state it fully would require an article, but some reference to it is necessary. The conditions of modern society have long passed beyond the stage where the relationships which it entails can be satisfactorily adjusted on the basis of the Common Law alone. It is true that the Courts have of recent years proved the elasticity of the Law of

Tort to some effect, but the Law of Contract seems to be unamenable to the necessary process of adaptation. Even if the proposals of the Law Revision Committee are given legislative sanction the position will be only partially improved because of the crucial difficulty of coping with the element of economic power which so frequently vitiates that basis of freedom on which contract law is in theory built up.

The truth, of course, is that the Law of Contract in the form in which we now know it was largely invented to serve the purposes of a particular economic era. It reflects the requirements of *laissez faire* economics. The law, if it is to satisfy its objective, must always adjust itself to the social requirements of the time, and is in particular bound to reflect to some extent the interests which are politically or economically powerful in the community. Strictures such as those passed by Mr. Hughes are met with on almost all occasions when innovations in the legal system are made. This has not only been so in the case of practically all the social legislation of the last century, but also in regard to many judicial innovations such, for example, as the fundamental twists which have from time to time been given by the Courts to the Law of Restraint of Trade. In regard to legislation we need only mention the violent attacks which were made upon the Trade Union Act of 1870, the Workmen's Compensation Act of 1906, and the Trades Dispute Act of 1906, measures which are now admitted by the great majority of their earlier opponents to have been necessary and to have worked satisfactorily. They were, however, statutes which certainly made substantial adjustments in the law in favour of one section of the community, a section which is generally admitted to have been unjustly dealt with by earlier developments of the law.

The truth of the matter, of course, is that in densely populated urbanised states where the mass of citizens are constantly in contact with mechanical and other appliances which are a source of danger to them, a completely new outlook in regard to the question of compensation for, or rather of protection from, the results of injury is required. A system of universal insurance is really called for, but until such a comprehensive solution comes within the area of practical politics every adjustment which will narrow the incidence of unprotected injury is to be welcomed. The Workmen's Compensation Acts, now rapidly extending the ambit of their operation by the inclusion of numerous industrial diseases, a development hardly expected when compensation was originally introduced, furnish an excellent illustration of this. It is hardly necessary to mention that while formally they make employers individually responsible for industrial accidents to their work-people their actual effect has been to establish a new and important field of insurance.

The coming of the motor car established an acute situation in one particular direction, because the number of comparatively poor people driving motor cars and cycles is very large, while the injuries likely to result from carelessness are by nature grave. The problem is common to all civilised countries, and has been engaging attention everywhere. The solutions or attempts thereat made by other legislatures are very interesting and appear in a number of cases, we may mention perhaps particularly Sweden and New Zealand, to be more successful than our own, some of the deficiencies in which are acutely pointed out by Mr. Hughes, and others of which are becoming evident from the Law Reports month by month. It is exceedingly difficult in a country where financial interests are all powerful to obtain the enactment of any measure which even in appearance places

a burden upon them, and this explains the undue tenderness to the insurance companies which so substantially weakened the compulsory insurance provisions of the Road Traffic Act, 1930.

R. S. T. CHORLEY

An Effective System of Private Third Party Insurance

It is often assumed that the difficulties which are being experienced in this country in the operation of the compulsory third party insurance provisions of the Road Traffic Acts are inherent in a system operated by private insurers, and that until the State steps in and takes control such difficulties are not wholly eradicable. The editorial comment, for instance, in *Halsbury's Statutes* on s. 10 of the Road Traffic Act, 1934, which enumerates certain circumstances in which insurers may still avoid liability, is typical: "So long as insurance policies are effected with private insurers and there is no State indemnity to third parties such provisions are no doubt inevitable." (Vol. XXVII, p. 544)

As an answer to this view, and as a supplement to the article by Mr. Hector Hughes in the previous number of this REVIEW, which shows that this country's system is a long way from perfection, it is interesting to note that New Zealand has evolved a system of private insurance without Government aid, which has reached a high degree of efficiency.

In broad outline the method there adopted is the same as in this country, viz. by providing that every driver, rather than every car, should be covered by an effective policy, but in the working out of this scheme there are wide differences between the two countries.

New Zealand was two years ahead of England in this field, and practically all the law on this subject is to be found in a short Act entitled the Motor-Vehicles Insurance (Third Party Risks) Act, 1928, but to understand the operation of the system a brief sketch must first be given of the procedure on the annual registration of a car. On the 31st May in every year, all registrations, insurances, and drivers' licences expire, and an owner, if he wishes to continue using his car, must register it afresh, and at the same time nominate any insurance company carrying on this class of business in New Zealand as his third party insurer and pay a certain premium, which is fixed by Regulation, and varies according to the class of vehicle, but not from company to company. The "nomination" is effected by filling in a statutory form much less comprehensive than the usual proposal forms current in this country, (the owner's name, address, and occupation, and a full description of the car are practically the only things required) and handing it to the Government Official who attends to the registration. At no time during this process does the owner come in contact with the company he has nominated, and the latter has no opportunity of refusing the risk. In fact the company does not even know of it until the premium, less administration expenses, and particulars of the car and owner, are given to it by the Government Department concerned. When the owner has handed in this form and paid the registration fee and insurance premium he is assigned a new registration number and given new number-plates, which are changed from year to year, sometimes being white on a blue background, sometimes black on yellow, etc. The object of this, of course, is that a person who takes his car on the road after the 1st June without re-registering and renewing his insurance will be immediately detected and

stopped, and the chances of his having an accident while uninsured are reduced to a minimum.

With this knowledge we can now proceed to examine the Act itself. Section 3 is the operative section, and some of it is worth quoting in full. It provides that the owner of a motor vehicle shall "insure against his liability to pay damages on account of the death of any person or of bodily injury to any person in the event of such death or bodily injury being sustained or caused through or by or in connection with the use of such motor vehicle in New Zealand. For the purposes of this Act and of every contract of insurance thereunder every person other than the owner who is at any time in charge of a motor vehicle, whether with the authority of the owner or not, shall be deemed to be the authorised agent of the owner acting within the scope of his authority in relation to such motor vehicle."

It then goes on to provide that if at the time of any accident a person other than the owner is in charge of the vehicle with the owner's authority he shall be indemnified by the company to the same extent as the owner so long as he is the holder of a current driving licence.

The effect of this is that in any accident caused by the negligence of the person driving the owner's car, whether it be the owner himself, his servant on his master's business or not, or even a thief (per Reed, J., in *Stewart* v. *Bridges*, [1935] N.Z.L.R. 948) a third party who suffers death or injury thereby will be able to sue the owner, who, if he was not in charge himself, is deemed to be the wrongdoer's principal; and the owner is, of course, backed by the company. But this statutory agency does not prevent the sufferer from suing the actual wrongdoer, and though that would be a futile action in the case of the thief, unless he were a man of substance, yet if the wrongdoer be a licensed driver operating the vehicle with the consent of the owner, the sufferer can as safely sue him as the owner, and know that he, too, will be indemnified.

The remainder of the Act is largely devoted to the detailed working out of the important principle established by this section. The term "contract of insurance" is, of course, a legal fiction, for the relation between the company and the owner is devoid of all the essential bases of contract, and in this fact lies the success of the whole scheme. It has already been pointed out that there is no communication between the insured and the insurer, so that no "offer" as such is made, and even if it were the latter has no option but to accept it. Further, the contract is deemed to be complete, and the insurance in operation, as soon as the premium is paid to the Registration Authority, and the contract enures for the benefit of a transferee from the owner, whether the company consents, or even knows of the transfer or not.

There are certain limitations that do not appear in the English Acts. First as to amount: the company is not bound to pay more than £2000 in respect of death or injury suffered by any passenger in the vehicle to which the insurance relates, nor more than £20,000 in respect of all claims by such passengers. As regards persons other than these, however, its liability is unlimited. More important are certain provisions excluding the claims of certain persons altogether. These are—

(*a*) Persons living with the owner as members of the same family.

(*b*) Relatives of the owner not more remote than the fourth degree.

(*c*) Persons "in the service of the owner" at the time of the accident.

(*d*) Passengers in a private motor vehicle to which the insurance relates.

(*e*) Passengers not being carried for hire in what might by contrast be called a "public" vehicle to which the insurance relates.

These exceptions are rather arbitrary, and their wording in the Act such that they will probably give the Courts some trouble, though the number of reported decisions on the whole Act is, up to the present, remarkably small. There seems to be no good reason why the owner's family and near relations should not enjoy the same protection from his erratic driving as the uttermost stranger does. The third exception is similar to that contained in s. 36 (1) (*b*) (ii) of the English Act of 1930, though much wider, and again rather irrational. Even the latter is wider than the language of the Workmen's Compensation Act, which, it is presumed, prompted the exclusion (see per Slesser, L.J., in *Izzard* v. *Universal Insurance*, [1936] 2 K.B. 555, at 570).

It is hard to imagine any good reason for these first three exceptions. In each case they relate to persons who may be presumed to come in contact with the owner (and his car!) more frequently than total strangers, and therefore more liable to be involved in accidents. But surely, if the aim is to have an insurer behind every negligent accident, the most frequent types of accident should secure the best protection the Act can give.

The remaining two exceptions are not so unreasonable, for while a person cannot exercise any choice over the car which runs him down, he can, in most cases, select the car in which he travels, and can make inquiries beforehand as to the extent of the driver's insurance. For one result of this automatic but limited insurance on every car is that the great majority of owners in New Zealand take out a further policy, covering damage to the car itself, death or injury to themselves and their passengers, etc. (but not always non-paying passengers in a "public" vehicle).

There was some interesting discussion on the effect of the whole Act in a case arising out of exception (*d*) above. This was *Shirley* v. *MacDougall and the Royal Insurance*, [1934] N.Z.L.R. 1059. The first defendant allowed A to use her car to drive X and Y to and from a certain place, they agreeing to pay A a sufficient sum to cover the cost of petrol and other expenses. The plaintiff asked A if she might accompany them, and he agreed on her paying him £1. All of this was known to the first defendant. Owing to A's negligence the plaintiff suffered injury whilst a passenger and brought the present action against the owner and her insurer, who was joined by consent. There was no evidence that the vehicle had ever carried passengers for hire before, and the Court refused to class it as a vehicle "plying for hire" (or, as I have named it in exception (*e*), a "public" vehicle), and therefore the insurer was not liable, under exception (*d*) to indemnify the owner. Further, A was held to be a bailee, and consequently not the authorised agent of the owner, so that the latter part of s. (3) (above) could not be called in aid against the insurer. Nor could the owner be held liable because the anomalous extension of liability created by that section was expressed to be "for the purposes of this Act and of every contract of insurance thereunder" and must be so limited. The statutory insurance did not cover this case, so that it did not come within the purposes of the Act, and apart from the Act the owner was plainly not liable.

With this may be contrasted *Wyatt* v. *Guildhall Insurance*, [1937] 1 All E.R. 792, which was a case arising on not dissimilar facts under the English Act. There the owner, who was not in the habit of carrying passengers for hire, was paid by the plaintiff to take him on a journey, during the course of which the plaintiff sustained injury while a passenger

owing to the owner's negligence. The plaintiff recovered damages against the owner, but it was held in an action to enforce this judgment against the insurer that the owner's "private car" policy did not cover this risk, and that he was not, under s. 36 (1), bound to insure his passengers on this one isolated occasion.

Apart from a section making similar provisions in the case of an insolvent owner as are contained in the Third Party (Rights against Insurers) Act, 1934, in this country, most of the remainder of the Act is directed towards giving the Insurance Companies some measure of protection against evildoers, but in each case safeguarding the public too. For instance, a person making false statements for the purpose of effecting a contract of insurance is liable to a fine of £100, and he is bound under penalty of a substantial fine to insure his vehicle in the right "class," and to pay the full amount of the premium for that class; but default in either of these cases does not invalidate the policy, though the company's rights against the offender are preserved. Again, failure to give notice of an accident does not affect the validity of the policy, but in such a case the company is empowered to recover from the owner any sum which it may have paid out in respect of a claim arising thereout. Another protection given to a company that has been nominated by what experience shows to be a completely reckless driver is its power to apply to an inferior court for an order cancelling that person's licence.

One would think that the natural result of all this would be to send the premium rate up to an appalling figure, but the simplest answer to that is to state the facts. The rates current in New Zealand to-day (which, as mentioned previously, are fixed by Order in Council and have fairly recently been reviewed) vary from a minimum of 17s. (for a motor car used mainly for private and social purposes, with a limited amount of business use) up to a maximum of £9 7s. 6d. (for large service (passenger) cars that travel long distances at high speed every day) per annum. Which, few will dispute, compares very favourably with the premiums asked in this country, but there seem to be plenty of companies that regard third party insurance in New Zealand as a profitable business.

We may conclude this summary with a short examination of the merits of the New Zealand Act.

In its favour can be urged two points, one all-important, the other trivial—

(1) First, of course, is the fact that it carries out the policy of the legislation by reducing the chances of negligent injury done to a third party not being covered by insurance to a minimum. This it does—

(*a*) by instituting an artificial relation between the company and the insured, and preventing the former from escaping liability by relying on a defence arising out of what would otherwise be a contract, i.e. by misrepresentation, etc.,

(*b*) by making the owner responsible for the negligence of unauthorised and unlicensed drivers.

(2) Of much less importance, but worth mentioning, is the fact that this scheme obviates the necessity of every driver being able to produce on demand a certificate of insurance to show that he is covered, which entails the risk of losing this valuable document.

On the other hand, the New Zealand Act carries with it some disadvantages which should be mentioned. These are quite apart from the

criticisms already made of the exemptions from liability, which are defects of detail, and in no way weaken the principle or framework of the Act—

(1) The statutory contract of insurance does not cover passengers, except paying passengers in a "public" vehicle, as most policies in England do. (But this is not imperative in this country either (Road Traffic Act, 1930, s. 36 (i) (*b*) (ii), and what are known as "Act liability" policies, complying with the bare statutory requirements are not uncommon here).

(2) This leads to the slight objection that an owner who wishes to be adequately covered must take out two policies, and the average motorist in New Zealand has in addition to the compulsory "contract of insurance" a policy insuring his car from damage or theft, himself and his passengers from injury or death, etc., all of which can be effected, together with the statutory requirements, in the one comprehensive policy in this country.

(3) A new number and fresh number-plates are required every year, but at 2s. per annum, these, if they help to carry out the purpose of the Act, can hardly be called a luxury.

(4) Finally, the scheme makes no allowance for rebates on premiums, which are, of course, the same for all drivers of any particular class of vehicle, good or bad. In this country a driver who completes a year without making a claim on his insurer obtains a rebate on his next premium, and it may be thought that the absence of such a provision in New Zealand would be conducive to an increase in reckless driving there. But this is not so, for the flat rate is applicable only to the statutory insurance, and the careful driver obtains a rebate on the separate insurance which he effects on his own car.

In conclusion it may be mentioned that it is possible that the New Zealand Legislature will go much further than this to protect pedestrians, for last year the Minister of Transport announced to the House of Representatives that the Government was considering two alternative proposals to apply in cases of injury caused to them by motorists—

(*a*) that the burden of proving absence of negligence should be thrown on the motorist,

(*b*) that a rule of strict liability be established.

A. M. Finlay

COMMON EMPLOYMENT

Reflections on Two Recent Cases

TWO methods of escape from the mischievous operation of the doctrine of common employment have recently come into prominence. The first method is based upon the fact that a master can plead common employment only when he is sought to be held liable vicariously, but not when sued for failure to discharge duties laid upon him personally, by common law or by statute. Thus, as a result of *Wilsons and Clyde Coal Co.* v. *English*, [1938] A.C. 57, where the injury suffered by the servant, although occasioned by the negligence of a fellow-servant, can be traced to a breach of duty laid upon the master, such as the duty to provide a safe system of working, the master cannot shield himself behind the negligence of the fellow servant. His duty is to provide a safe system, and not merely to select competent servants to whom this duty can be delegated. No doubt, a large proportion of industrial accidents is due to faulty system, and this decision will therefore be of great importance, particularly if combined with the *res ipsa loquitur* principle, as suggested by the learned writer commenting on this case in Vol. I, No. 3, p. 229 of this Review. But no progress has been made towards alleviating the position of servants injured in accidents solely due to the negligence of fellow-servants. Recent attempts to avoid the application of common employment in such cases have completely failed. They were based upon a rule, believed to restrict the scope of the defence of common employment by requiring not only employment by the same master, but *common* employment. This restriction, described by Lord Brougham in *Bartonshill Coal Co.* v. *McGuire* (1858), 3 MacQ. 300, at p. 313, as a "most material qualification" upon the doctrine, has, it is submitted, been deprived of all meaning, at any rate for practical purposes, as a result of the decisions in *Radcliffe* v. *Ribble Motor Services, Ltd.* (1938), 54 T.L.R. 260, and *Metcalfe* v. *London Passenger Transport Board* (1938), 54 T.L.R. 678.

The qualification can only be important if it leads to fairly frequent findings against common employment. This would be the case if, following Lord Chelmsford in *Bartonshill Coal Co.* v. *McGuire* (*supra*), common employment were confined to employment within the same department of duty. This test appeared to be formulated with a view to "the old conditions under which a few workmen worked with simple tools under the eye of the master" (Bohlen, *Studies in the Law of Tort*, p. 463). The defence would then scarcely be available to larger industrial undertakings organised in numerous departments. Yet the desire to enable the expansion of industrial undertakings by exonerating them from liability towards their employees was, as Bohlen points out, one of the chief causes responsible for the establishment of the doctrine. That the obstacle placed by Lord Chelmsford's test in the way of unfettered industrial development was clearly perceived appears from the judgment of Pollock, C.B., in *Morgan* v. *Vale of Neath Railway Co.* (1865), 5 B. & S. at p. 742, where the threat of a "flood of litigation is pointed out" which would result if "every large mercantile and manufacturing establishment would be split up into different departments of labour." Experience, moreover, showed that the increase of accidents was not only due to the rising number of men employed by the same master, but that it was even more affected by the growing complexity of industrial organisation. On reflection it becomes evident

that the likelihood of accidents is smaller within a group of servants engaged in similar work at a common object than as the result of the occasional contact between servants employed in different sections, less familiar with the others' machinery and routine of work. Towards a creature of their own making the courts did not show the tendency "to minimise or neutralise" the effect of a new rule of law (Lord Wright, in *Rose* v. *Ford*, [1937] A.C. at p. 846). It is therefore not surprising to find that Lord Chelmsford's test was soon replaced by a different test, framed with a view to the change in industrial conditions and thus more effective to secure the underlying objectives of the doctrine of common employment. In *Morgan* v. *Vale of Neath Railway Co.* (1864), 5 B. & S. at p. 580, Blackburn, J. laid down that "the employment must be common in this sense, that the safety of the one servant must in the ordinary and natural course of things depend on the care and skill of the others." The employment will be common, although the two servants are working in entirely different departments of duty provided "the risk of injury from the negligence of the one is so much a necessary and natural consequence of the employment which the other accepts that it must be included in the risks which are to be considered in his wages."

It is not easy to distinguish this test from the prerequisites of an action of negligence. To succeed in such an action the plaintiff must show that his safety did in the ordinary and natural course of things depend on the care and skill of the defendant. Thus, whenever a servant sued his master to recover damages for injuries received as a result of the negligence of a fellow-servant, he would by proving negligence enable the master to plead common employment. This dilemma of either proving negligence and failing because of common employment or of proving that there was no common employment and failing because negligence had not been established, accounts for the remarkable fact, pointed out by Sir Francis H. Jeune in *The Petrel*, [1893] P. 320 at p. 323, that prior to this decision there are no reported English cases where two servants of the same master were not held to be in common employment. The law was now perfectly adjusted to the economic requirements of the first half of the nineteenth century. In the meantime, however, changes had occurred. "Industry had grown rich beyond belief. The risks of physical hurts could be distributed as well as could wages and other costs. Business no longer required protection against its workmen as did the household of Lord Abinger's century. The dangers incident to employment were such that the most intelligent and loyal service could not prevent them. On the other hand, workmen had become even more dependent upon the mercy of avaricious industrialists who would not of their own accord provide the preventive safeguards which were within their command. It was now seen that the power of society was needed to compel employers to purge their conduct towards their employees rather than the reverse." (Green, *Judge and Jury*, at p. 125). This changed policy led to the enactment of the Employers' Liability Act and the Workmen's Compensation Acts. It is also reflected in the decision in *The Petrel* (*supra*). In an action arising out of the collision in the Thames between two ships belonging to the same company it was decided that no common employment existed between the crews of the two ships. With little difficulty the judgment disposes of such a mechanical test as that of physical contiguity of the employments. Similarly, the pursuance of one common object is rejected as a test of common employment. Since this test does not require that the immediate object

of labour be common, and since employment by the same master necessarily imports the common ultimate object of promoting the interests of the master, this test amounts to a mere restatement of the requirement of employment by the same master. The main contribution of the judgment is contained in the comment upon the test of Blackburn, J., which is ultimately adopted. "The consideration that the risk of injury to the one servant is the natural and necessary consequence of misconduct in the other implies that the skill and care of the one is of special importance to the other by reason of the relation between their services" (at p. 326). The effect of the emphasis which these words lay upon the special risk arising out of the relation between the two servants concerned is lucidly expressed in the formula suggested by a learned writer in the current issue of the *Law Quarterly Review* (Vol. 54, p. 162). "If the one servant is negligent, is the other more likely to be injured by this negligence than is an ordinary member of the public?" As a result of this decision it had become necessary to subject the conduct of the servant who caused the injury to a twofold scrutiny. To prove negligence it had to be shown that it was reasonably likely to cause harm to another person, and to disprove common employment it became then necessary to show that it was not more likely to injure a fellow-servant than an ordinary member of the public. This would only be so if contacts between the two servants were rare and accidental. But then not only would it be unlikely that a fellow-servant rather than an ordinary member of the public would be injured, it would also be unlikely that a fellow-servant would be injured at all. To use the example of Sir Francis H. Jeune, "if a person carried on the occupation of a banker and a brewer in different localities, and his bill clerk was run over by his drayman," it was now possible for the bill clerk to recover from his master. Yet in order to estimate the practical value of the benefit thus conferred on workmen by the decision in *The Petrel*, it will be readily conceded that accidents between bill clerks and draymen, although possible, are far from being common. The application of the test laid down in *The Petrel* requires a nice calculation of probabilities. There is further an inevitable bias after the event to consider that which has occurred as likely to have occurred. Bearing this in mind it becomes difficult to form very definite opinions on the facts of such cases as *Radcliffe* v. *Ribble Motor Services Ltd.* (*supra*) and *Metcalfe* v. *L.P.T.B.* (*supra*).

In the first case a number of motor coaches had been hired for an excursion. Returning to the garage one of the coaches stopped and the driver got out to see what was wrong. The driver of one of the following coaches noticed that the first coach had stopped and proceeded to overtake it with the intention of pulling up and offering assistance, in accordance with what was expected of him by his employers, if not in accordance with their actual orders. Whilst overtaking he negligently failed to notice the driver of the first coach who was crushed and fatally injured. In an action by the widow the Court of Appeal, reversing the decision of Hawke, J., found that the drivers of the two coaches were in common employment. In the judgment of Lord Justice Greer, it was possible to distinguish the present case from *The Petrel*, since in the present case the two servants were engaged in carrying out the same or similar orders in close juxtaposition to one another. This alone would not necessarily establish that each coach-driver was exposed to the risk of negligence on the part of another to a larger extent than ordinary members of the public. In

recognition, it would seem, of the desirability of a further link in the chain of probability, Greer, L.J., rested his decision also on the fact that the accident occurred in the attempt to come to the assistance of a fellow-servant. Bound not only by good driving manners but also by the order of his employers, the negligent coach-driver was more likely to offer the doubtful boon of his assistance to a fellow-driver than to other road users, thus creating a particular risk of injury for his fellow-employees. This reasoning might be convincing but for the doubt, on a question of fact, whether the accident did not take place as the result of negligent overtaking rather than as the result of negligent assistance. It is not quite easy to see in what way the mode of driving past a stationary vehicle is affected by the intention to return to it and inquire whether help is wanted, or at any rate why such an intention is likely to have a deteriorating effect upon the standard of driving.

As regards *Metcalfe* v. *L.P.T.B.*, it is not even possible to rely upon the fact of similarity of orders to be executed in close proximity, by which *Radcliffe* v. *Ribble Motor Services Ltd.* might be distinguished from *The Petrel.* In *Metcalfe* v. *L.P.T.B.*, Macnaghten, J., held that a bus conductor was barred by common employment from recovering damages for injuries received in a collision between a bus and a tramway car, due to the negligence of the driver of the tramway car. *The Petrel* was distinguished on the ground that there was no analogy between vessels at sea and public vehicles in the streets. But if not only the bare facts but also the test laid down in general terms in *The Petrel* had been considered, the decision, it is respectfully submitted, would have been different. Two vehicles of the L.P.T.B., especially two buses serving on the same route, a situation instanced by Macnaghten, J., as a clear case of common employment, will meet more regularly than two ships of the same owner, navigating at sea or even in the river Thames, and the danger of collisions must be proportionately greater. Yet there is an unproportionately higher number of accidents on the road than of collisions at sea. Without deliberately ignoring common experience it can, therefore, not be maintained that, whereas negligent navigation of a ship is unlikely to result in a collision with a vessel owned by the same shipping line, negligent driving of a tramway car is likely to lead to a collision with another vehicle owned by the same company. In both cases such negligence might at least equally well result in injury to an ordinary member of the public. Traffic in the streets of London is not monopolised by the L.P.T.B., just as traffic on the river Thames was not monopolised by the owners of *The Petrel.* On the other hand, the closer the position of the L.P.T.B. approximates to such a state of monopoly the more justification there would be for affirming the existence of common employment between the employees of the Board. From this angle it would, contrary to the view expressed by Macnaghten, J., not seem entirely irrelevant to consider the fact of the amalgamation of various transport undertakings in the L.P.T.B., which did not only increase the number of fellow-employees, but which also constituted a step towards the establishment of a traffic monopoly. An analysis of the social background in which a rule of law operates, particularly if based on such reliable information as can be obtained from statistical data, might prove of great assistance to the Court. The argument in favour of utilising quantitative research in the social sciences for the judicial process is by no means as devoid of authoritative approval as might be expected. The use of this method by the House of Lords in *Fender* v. *Mildmay*, [1938]

A.C.1, has been noted by the learned writer commenting on this decision in a previous issue of this review (Vol. I, No. 2, p. 152).

The decisive factor for the judgment of Macnaghten, J., was the resemblance of the facts of the case before him and the facts of *Radcliffe* v. *Ribble Motor Services, Ltd.* Disregarding those particular circumstances of that case which gave some substance to the finding of a special risk inherent in the relations between the two employees, Macnaghten, J. found the analogy sufficiently established by virtue of the fact that both cases were concerned with collisions in public streets between vehicles of the same description, considering it immaterial "that the collision in fact occurred between an omnibus and a tramway car at a place where their respective routes coincided." These words recall a dictum of Pollock, C.B. (in *Waller* v. *The South Eastern Railway Co.* (1863), 2 H. & C. at p. 110) which does not seem to have been considered: "Where, indeed, two trains belonging to the same Company are travelling on different lines of rail which at a certain point intersect each other, or join a principal line, and in consequence of the negligence of the driver of one of the trains a collision ensues, by which the driver of the other train is injured, I own there seems to me less of what may be called an employment in one common object." It would seem that, in the opinion of Macnaghten, J., the analogy between the two cases was so strong that he even would have felt justified in overruling expressly the test laid down in *The Petrel*, as distinct from the *ratio decidendi*, strictly confined to the facts of that case. Short of stating it expressly the judgment has, as it has been attempted to demonstrate above, abolished the test of Sir Francis H. Jeune. In support of this view of the effect of this decision it is also possible to cite Macnaghten, J.'s statement that "all the servants of a road transport company must be in common employment when engaged on the company's business," made without adding any qualifications as to the existence of a special risk of injury. There is no reason to regret the disappearance of a test under which the only type of case certain not to fall within common employment was so remote from reality as the accident between bill clerk and drayman. Yet since the judgment in *Metcalfe* v. *L.P.T.B.*, refrains from stating any principle emerging from the comparison of the facts of this case with the facts of *Radcliffe* v. *Ribble Motor Services, Ltd.*, there seems to be at present no general rule which could in any circumstances guide the court to find that two servants of the same master are not in common employment.

The only general principle to which reference was made in *Metcalfe* v. *L.P.T.B.* was that which had already been mentioned in many previous cases, namely the theory of the voluntary assumption of risk by the servant, on which the doctrine of common employment is alleged to be founded. To use this doctrine as a test for deciding the question of common employment would seem to furnish the best solution. It would ensure the interpretation of a legal doctrine in the light of its rational basis, borderline cases being determined in the manner best suited to achieve the aims pursued by the doctrine. This method has, however, proved unworkable, because it cannot be maintained that voluntary assumption of risk in consideration of compensation adjusted accordingly is the true explanation of the doctrine of common employment. The fallacy of this and of other attempted explanations has been fully demonstrated by the author of the note on common employment in Vol. I, No. 3, of this Review. The arguments there advanced are reinforced by the facts of *Metcalfe* v. *L.P.T.B.*

Applying this explanation one would have to say that the plaintiff, who had been working as a bus conductor before the creation of the L.P.T.B., was deemed to have assented to the amalgamation, and that in law he was deemed to be compensated by a—probably fictitious—rise in his wages for the real increase of risk of injury from fellow-employees. On the basis of this explanation there was, as Professor Batt points out (*The Law of Master and Servant*, 2nd Ed., p. 308, n. 5), no reason why the alleged consent to accept risk should "stop at the negligence of fellow-servants," and why it should "not include the master's personal negligence." This dangerous fiction has thus been responsible for the confusion as to the relation of the doctrine of common employment to the liability of the master for his personal negligence, which has now been clarified in *Wilsons and Clyde Coal Co.* v. *English* (*supra*). To go behind the presumption of voluntary assumption of risk and to lay down the limits of common employment with a view to giving effect to that policy of the law which is concealed in this as in every other irrebuttable legal presumption, is quite unthinkable. The policy of the law cannot to-day be openly identified with protection of the employer-class balanced by Lord Abinger's recommendation to employees of "chastity of conduct born of hardship." (Green, *Judge and Jury*, p. 122). Until Parliament sees fit to abolish a doctrine so incompatible with modern notions of social justice, the courts, unable to proceed according to the only rational method of interpretation, will be compelled to rely upon arbitrary tests. None of these tests has been able to establish itself firmly. Constantly attempts have been made to discredit their validity by contrasting them with the facts of the case in which they had been enunciated. This process has now resulted in a state where the courts are reduced to a mechanical comparison of facts, and as in these cases the decisions were invariably for common employment, what other result may be expected by the continuance of such a process!

J. Unger

STATUTES

The Population (Statistics) Act, 1938

It is appropriate that the centenary celebrations of the General Register Office of England and Wales should be followed by an Act which extends and improves the system of vital registration in this country. But it is singularly unfortunate that we should have had to wait over a hundred years for any fundamental change in the system introduced under the Registration Act of 1836. The changes now made are intended to facilitate the study of population problems in this country, and this is a particularly noteworthy point, since previous Registration Acts were not really designed for such a purpose. A memorandum issued by the General Register Office refers to this peculiar situation, and points out that "in England and Wales, the prime purpose of vital registration is the recording of 'Acts of Civil Status.' In the statutes dealing with the registration of births and deaths there is practically no provision for statistical work," and "the first legislative enactment dealing specifically with this point is that contained in Section 5 of the Census Act of 1920."

The new Act, the object of which is specifically stated as "the compilation of statistical information with respect to the social and civil condition of the population of Great Britain," provides that a number of new questions (the answering of which is compulsory) shall be asked at the registration of births and deaths, and all these questions are designed to yield material for evaluating the multiple elements affecting the replacement rate of the population. Thus, at the birth of a child, the following new questions are asked. First, the age of the mother. This is needed because it allows the calculation of fertility rates for the various age-groups in the potentially fertile span of a woman's life. From these rates may be computed the number of female children which would be born to a woman in her lifetime, according to the circumstances of a particular year or period. This result, when combined with the relevant mortality data, gives the net reproduction rate, which shows the extent to which women in a given period are replacing themselves by women in the subsequent generation, and forms one of the most useful indices of the degree to which a population is maintaining itself, excluding the influence of migration.

The second question asks the date of marriage of the mother of the child which is being registered. This is included because if the fertility of marriage is to be analysed and compared as between different periods, geographical regions and social classes, it is clearly essential to compare marriages of equal duration. Further, by combining such data with the age of the mother it is possible to estimate the separate influence of the age of the mother and the duration of marriage upon marital fertility. Thirdly, the mother of the child which is being registered is asked two questions about the number of children born to her during her lifetime. One of these questions refers to the children of previous marriages, and its purpose is to enable women who have been married more than once to be considered separately from those who have been married once only. But the general question concerning the number of children born, has a twofold purpose. First, the order of birth of newly born children provides a valuable index of the way in which changes in fertility are taking place. This is important in planning the social services, for clearly the needs of new housing would be different if a general levelling of all families to

the two-child size were occurring, than if the number of four-child families were remaining unchanged while the number of childless marriages were increasing. Such data also form a valuable index of the significance of sudden changes in the birth rate. An increase in births, accompanied by a rise in the proportion which first births formed among all births would probably be due to an increase in marriage in the recent past, and might, therefore, be a purely temporary phenomenon. But an increase in births accompanied by an increase in the proportion of third, fourth and later births would probably be due to some far more fundamental and permanent factor. Finally, knowledge of the birth order is of paramount importance in analysing the course of maternal mortality. First births tend to involve the greatest risk of maternal death, especially when the mothers are relatively old. Consequently, it is essential to know the proportion of first births among all births in any year, and the ages of the mothers, in order to obtain a correct basis for computing maternal mortality rates.

The questions added at the registration of deaths are mainly concerned with the question of providing year-to-year estimates of the population. Correct enumerations of the population are obtained only at the censuses, and for the intervening periods estimates are made by adding the live births, subtracting the deaths from the relevant age-groups, and making an allowance for migration. By asking, at the registration of deaths, the age and marital condition of the deceased, and the age of the surviving spouse, if there is any, and by combining these facts with the annual returns of marriages, it will be possible to estimate the inter-censal populations by marital condition (single, married, and widowed) as well as by age and sex. Such populations will be used for computing relatively accurate marriage rates. Information regarding the date of marriage of deceased married women will also be obtained at the registration of deaths, and whether these married women had borne any children during their lives. It will, therefore, be possible to gain a clue to the frequency of childless marriages, a problem about which very little is known in this country.

Such are the main objects of the Population (Statistics) Act. Three further points should be noted. First, the additional information will be recorded in special registers, and not entered on the birth and death certificates which are supplied to the public. Secondly, the Act does not supply all the needs of demographic analysis, for most of the information obtained under it will relate only to those women who bear, or continue to bear, children after the Act comes into force (on or after 1st July, 1938). This information will therefore be a very incomplete guide to the position in Great Britain, and needs to be supplemented by special fertility questions which should be included in the schedules for the next census. Moreover, the problem of childless marriages cannot be approached satisfactorily through death registration. Apart from the fact that much of the information obtained by this means would be of very doubtful accuracy, the time taken to collect the facts relating to even one generation of women would be extremely long. With present mortality, a woman just reaching her fifteenth birthday when the Act came into force could expect to live another fifty-four years. It would thus take about fifty-four years to collect the required information relating to the women who are just about to enter the reproductive period. Finally, the Act as it now reads is a much weaker version of the original Bill. In particular it will not give any information on the length of the period between the births of successive

children to the same mother, or on the real order of birth, since the question of illegitimate births has not been dealt with satisfactorily. Moreover, the Act is to apply for ten years only, after which period the question of vital registration will be brought up again for further consideration. This dilution of the original Bill was due to the opposition stirred up in the House of Commons, especially by Mr. A. P. Herbert. Apparently it is a British tradition to oppose attempts to improve or extend vital statistics, since almost every attempt in the past was accompanied or followed by protests. In the circumstances we are fortunate in not having a still further reduction in the value of the original proposals.

D. V. Glass

The Hire Purchase Bill

This bill which has attracted widespread public interest passed the House of Commons in May, and is confidently expected to go through the House of Lords without any further radical amendment. It is of considerable legal and of great social importance.

Hire purchase is of course in reality a form of sale by instalments. It took its present form as a result of the passing of ss. 8 and 9 of the Factors Act, 1889, which were re-enacted in the important s. 25 of the Sale of Goods Act, 1893, and the decision of the Court of Appeal thereon in *Lee* v. *Butler*, [1893] 2 Q.B. 318, under which a person who has agreed to buy goods by instalments can transfer a good title to a *bona fide* sub-purchaser notwithstanding that his contract provides that the property is not to pass until the final instalment is paid. The form of the contract was therefore changed to one of hiring, with an option to the hirer to become owner on completing payment of the instalments of hire, and the House of Lords, refusing to look beyond the form of the contract at the reality, decided that the hirer under such a contract could not transfer a title to a *bona fide* purchaser (*Helby* v. *Matthews*, [1895] A.C. 471). This decision has been severely criticised, and as recently as the discussion centring round the present bill it was roundly condemned by Mr. Mitchell Innes, K.C., as the *fons et origo* of all the trouble with regard to hire purchase. It is clear that the system depends on the possibility of the owner being able to recover the goods, and for good or ill the House of Lords started on its way a rivulet of retail trading which has become a mighty river, for as was said by Mr. Leslie, M.P., in the House of Commons, no less than five million families are involved in hire purchase agreements, while Mr. Rhys Davies, M.P., stated that one company had a turnover of £12,000,000.

It is curious that economists have not occupied themselves more with a phenomenon of such magnitude. The literature on the subject is small, not very satisfactory, and mostly American. There is a division of opinion, for example, on the crucial point as to whether trade depressions are accentuated by the volume of hire purchase sales. One school holds that they were a serious factor in the great slump of 1929 in the U.S.A.; another holds that they are a stabilising influence since they keep up the circulation of money during the period of depression.

The social aspects of hire purchase are also rather confused. During the recent discussions social workers on the whole were exceedingly critical of this form of trading, and a severe indictment was put up both in Parliament and in the Press. On the other hand, most protagonists seemed to be agreed that properly worked there is a great deal to be said for hire purchase agreements.

There can be no doubt that the social aspects as opposed to the economic played a dominating part in the minds of Miss Wilkinson, M.P. and those who assisted her to pilot the bill through the Commons.

The evil which Miss Wilkinson and her friends desired primarily to prevent is what is called the "snatching back" of goods when the hirer makes default with his payments. Most of those who took part in the Parliamentary debate, and in the newspaper discussion which followed, described really bad examples of this. There is no need to reproduce them. The representatives of the hire purchase traders admitted the evil while denying its prevalence. The bad cases are possibly only a fraction of the whole, but that fraction covers a substantial number of excellent citizens, and is large enough to call urgently for remedy. This has been provided by s. 10 of the bill under which so soon as one-third of the hire purchase price has been paid the owner is prevented from reassuming possession of his goods unless and until he has obtained an order from the County Court permitting him to do so. Very wide powers are conferred upon the Court (s. 11 (4)) in cases where an action for recovery of possession is brought, including those of rescinding the contract, and of reducing the size of the instalments payable so as to conform to the means of the hirer. If wisely used this power may mark the beginning of an epoch, for within the ambit of this form of trading it gives to the Court the full opportunity to prevent abuse of rights. If the owner recover possession without an order of the Court, e.g. by the use of professional bruisers as described in a case from Manchester, the hirer is given the right to recover all moneys paid or securities given under the contract (s. 10 (2)).

A peculiarly vicious extension of "snatching back" has been the "linked agreement." Under this, when the hirer has almost completed his payments on one contract he is induced to enter into a further one for more goods. The second contract is then linked up with the first, containing a provision that on any default of payment by the hirer the goods covered by both agreements may be retaken by the owner. Many instances were quoted where goods the price of which had long before been paid in full were seized under such clauses. This will now only be possible if the Court allows it, because in such cases recourse must be had to action at law even if one-third of the instalments under the second contract have not been paid (s. 12).

The bill applies to cases where the hire purchase price does not exceed one hundred pounds. There are however important exceptions to this: on the one side in the case of livestock the figure rises to five hundred pounds, and on the other in the case of motor vehicles, and railway wagons and rolling stock, it sinks to fifty pounds (s. 1). These figures represent compromises due to the opposition of vested interests.

In Scotland a similar though less far-reaching Act was passed in 1932. It is said to have been successful, but has led to a revival of the older method of sales by instalments, the hirer accepting the risk of fraudulent sales to third parties. In order to prevent this what are called "credit sale" agreements are brought within the scheme of the Act (s. 3); these include all cases where the price is payable in five or more instalments. Although there was some criticism of the escape of the four-instalment contract, it is quite obvious that only a minute fraction of the trade could be conducted on such a basis, and the loophole is therefore too narrow to do harm.

Many writers have emphasized the extreme ignorance and gullibility

of the hire purchasing public, an accusation which is probably too sweeping. However the bill contains provisions intended to give a safeguard. In particular the owner must state in writing before the agreement is entered into, the cash price, so that the hirer can see at once at what extra cost he is purchasing the privilege of paying by instalments. Again a memorandum of the terms of the agreement must be signed, and signed by the purchaser in person, so that the wage earner of the family will not in future be met by his wife's signature on an agreement for the purchase of a new radio set or piano (s. 2). This agreement must set out the contents of the schedule to the bill which make clear the right of the hirer to return the goods and the obligation of the owner to have recourse to the Court if he wishes to retake possession, as already described. It is significantly provided that the terms of the schedule must appear in print at least as large as that of the rest of the memorandum—it might have been wise to specify the size! The owner must always be prepared to provide a copy of the memorandum, of the sums paid to date, and other particulars in return for payment of one shilling (s. 6).

The hirer can always determine the agreement, but if he has not paid half the hire purchase price at the time of doing so he must bring his payments up to that figure (s. 4 (1)). He must thereupon of course deliver up the goods (s. 4 (3)). An important section gives to an owner who has obtained an order for redelivery of the goods the right to obtain from the hirer particulars of the whereabouts of the goods, and a recalcitrant hirer may be fined ten pounds (s. 7). Provisions in the contract designed to avoid the material requirement of the bill will be void (s. 5).

The hirer is given some protection against the tallyman or tout, who undertakes the actual work of fixing up the agreements, by two important subsections (s. 5 (*d*) and (*e*)) under one of which he is prevented from being treated as the agent of the hirer, and under the other of which the owner is not to be relieved of liability for the agent's acts and defaults in connection with the formation of the contract.

There is a number of other important provisions relating to such matters as appropriation of payments by the hirer when he has more than one agreement with the same owner, as to guarantors of the agreement; as to bankruptcy, and as to distress. There is not space to deal with these. We cannot however close this note without referring to the interesting s. 8, which applies the scheme of implied conditions and warranties contained in the Sale of Goods Act, 1893, ss. 12 and 14, to hire purchase contracts. It is noteworthy that the implied condition of title relates to the time at which the property is to pass, i.e. there is no need for the letter out to have a title at the time of the contract as held in *Karflex Ltd.* v. *Poole*, [1933] 2 K.B. 251. It is important to notice that the owner cannot contract out of the implied conditions and warranties as to title, quiet possession, and freedom from charge or encumbrance. The implied condition of reasonable fitness for a particular purpose arises in all cases where the hirer makes known the purpose in question, and is not limited as under the Sale of Goods Act, 1893, to cases where the seller deals in such goods and the buyer relies upon his skill and judgment. There is no prohibition of contracting out in the case of this condition, but any clause inserted for this purpose must be brought to the notice of the hirer and its effect made clear to him.

R. S. T. Chorley

REPORTS OF COMMITTEES

Report of the Committee on Insurance of Ships (Cmd. 5349)

Although it has attracted little attention this Report is of considerable significance, and if it had occurred in an age less hardened to loss of life would almost certainly have given rise to an important political issue. In a series of enquiries into the loss of British ships at sea, with heavy mortality, the distinguished judges who conducted the investigations criticised severely the modern method of insuring ships on valued policies for sums much greater than the real insurable value. In the view of Branson, J., there is abundant evidence to show that the growth of this dubious system has been largely due to the policy of underwriters intent on high premium incomes. As MacKinnon, L.J., said in the case of the *Michael* v. *Maris* such a system "almost invites such a casualty as is suggested to have occurred in this case."

The investigation of this Board of Trade Committee hardly bears out these strictures; they regard excessive insurance as not common and cases of wilful casting away as rare. Perhaps the opinions of Lord Merrivale, MacKinnon, L.J., and Branson, J., are of greater value. The Committee were obviously impressed by the evidence presented by the insurance interests, perhaps too much so. They nevertheless recommend that legislation shall be introduced in order to break up the system of insurances on hull or hull and machinery giving cover on one valued policy against the risks of total or constructive total loss, and also against the risks of particular average, general average, collision liability, etc. They think that if separate valuations were used the evil would largely disappear, especially if the limitations on the amount permitted to be insured which are insisted upon by underwriters in the case of honour policies were made compulsory in such cases. It is difficult to see how legislation on these lines can be effective without the co-operation of the market, but the market could if it liked produce its own remedy.

R. S. T. Chorley

The Report of the Departmental Committee on Corporal Punishment [1]

Penal systems in almost every country have their glaring inconsistencies —as is only fitting for this dark spot in human affairs where lack of logic has always been regarded as an essential prerequisite. The retention of corporal punishment as part of the—from most points of view—exemplary English penal system is a mystery only to those who ignore the traditional whims of penal reform throughout the world. Some other countries, notorious for the brutality of their penal methods, profess abhorrence of corporal punishment. Is it from a distaste for half-way measures that they are afraid of releasing a man when they have made him an implacable enemy of society by flogging? Is this the reason why they prefer to reserve this form of treatment for those who are not released at all—or is it sheer inconsistency?

The Report which gives rise to such reflections is an outstanding piece of work, equally distinguished by the clarity of its expositions as by the

[1] H.M. Stationery Office, 1938, Cmd. 5684, pp. VI + 153. 2s. 6d.

soundness of its recommendations. Whatever may be its immediate practical consequences, its value for the science of penology will remain.

After a brief historical introduction and a summary of the existing law the Report deals with the subject in three parts: Corporal punishment (1) of young offenders by Courts of Summary Jurisdiction, (2) by order of Superior Courts, (3) for offences in prisons and Borstal institutions. First the final recommendations: the Report advises the complete abolition of corporal punishment for the first and second group; as far as the third group is concerned, abolition for the Borstals only. As is only reasonable to expect in a matter where the legislator needs the support of popular opinion, the Committee have, on the whole, taken the course suggested by the majority of the witnesses.

I. In the case of young boys the trend of public opinion—at least in England and Wales—has already been clearly indicated by the fact that birching has entirely fallen into disuse in most of the Juvenile Courts, and that the recent increase in the total figures has not kept pace with the increase in the number of boys under fourteen dealt with summarily for indictable offences. This attitude has arisen from the conviction that judicial birching is inconsistent with the idea of reformation, and that even its value as a deterrent is more than doubtful. Figures of reconvictions after birching, of course, as the Report rightly emphasizes, do not prove much, since those who believe in corporal punishment will always be able to argue that the type of boy who gets it is from the beginning more likely to offend again. Nor does the Report regard the psycho-analytical arguments as a sufficiently safe basis for practical conclusions (by the way, is the fact altogether conclusive that none of the witnesses with actual experience of the administration of corporal punishment has ever observed any *overt* signs of sexual satisfaction in the flogger or the flogged?). A substantial majority of Chief Constables were in favour of retaining the existing powers, but mainly because they could not find any adequate substitutes for corporal punishment. Here as always, the problem of finding suitable alternatives is the one that causes the greatest embarrassment to the reformer, and it is here that the Committee have done most valuable work. The Report, in connection with the corresponding sections of the simultaneously published *Fifth Report of the Home Office, Children's Branch*, 1938, should do much to alleviate the perplexities of the Juvenile Courts by unfolding the great variety of methods of treatment at their disposal.

II. More difficult was the task of the Committee with regard to adult offenders, particularly as H.M. Judges of the King's Bench Division, in a written memorandum, had expressed themselves in favour of retaining the existing powers. The Report has, nevertheless, in the present reviewer's opinion, admirably succeeded in exposing the fallacies of the usual arguments, by a detailed statistical and psychological evaluation of the effects of corporal punishment on the various types of offences and offenders. Their figures, collected from the subsequent records of 440 men convicted of robbery with violence during the period 1921–30, difficult as their interpretation may be, at least seem to show that a sentence of imprisonment or penal servitude without corporal punishment is no less effective than a similar sentence combined with it. Moreover, since the offences for which corporal punishment may be imposed have been selected not in the light of modern penological experience, but "merely by historical accident," there is ample room for offenders who have been flogged to satisfy their

anti-social urges by committing equally serious crimes for which corporal punishment is not allowed.

III. There remains the question of corporal punishment in prisons and Borstal institutions, and it must be admitted that the reformer who does not happen to be a prison official has to face a problem which requires a more than ordinary amount of tact. In the other cases covered by the Report, every member of the community can regard himself as a competent judge, as every one is a potential victim of an offence with respect to which he now enjoys the protection, or otherwise, afforded by the threat of corporal punishment. In institutions, however, this weapon is designed exclusively for the protection of the prison officer, and to eliminate this part of the existing system of safeguards might look like being generous at the expense of others. It is true that some of the arguments advanced in the Report in favour of the existing law are sound in themselves; others may not be quite watertight. Be this as it may: the essential point seems to be that no Committee can be expected to recommend the abolition of corporal punishment against the explicit wishes of the prison service itself. Because of the support of the Prison Commissioners, the Report has found it possible to make such a recommendation for the Borstal institutions, though this was contrary to the views of the Visiting Justices.

The Report gives some particulars about fifteen foreign countries, twelve out of which do not employ corporal punishment. This part of the Report is, of course, far from complete, and space forbids dealing here more fully with the comparative aspects of the matter. It might, however, be noted that there exists, to the reviewer's knowledge, no Continental Penal Code where corporal punishment still figures as a punishment. It has also been omitted in the new Chinese and Palestinian Codes. In Germany, in spite of some support from certain quarters, responsible opinion seems against its introduction[2]. As far as its use in prisons is concerned, which had fallen into disuse in Germany before the War and was officially abolished in 1923, it might be of some interest to quote two statements by prison officials made after 1933: "The re-introduction of corporal punishment would drive us back to antiquated ideas. There is nothing that could really justify it as necessary and reasonable . . .[3]" And: "Corporal punishment became obsolete long before the War. What were the reasons? Not false sentimentality, which did not prevail at that time. One had, however, little confidence in its effect and, above all, there existed but little inclination among prison officials to act as hangmen . . .[4]" On the other hand, it is true, the Report is fully justified in drawing attention to the fact that prison officers in England and Scotland, as contrasted with their colleagues abroad, are unarmed, and it may be "a necessary corollary that every officer should feel that there is a power to punish in exemplary fashion any prisoner who may attack him."

[2] See *Das kommende Deutsche Strafrecht, Allgemeiner Teil* (1934), p. 98.
[3] *Monatsschrift für Kriminalpsychologie und Strafrechtsreform*, Vol. 26 (1936), p. 539.
[4] *Monatsschrift*, Vol. 26, p. 131.

HERMANN MANNHEIM

NOTES OF CASES

Immunity of Sovereign States

It is only a small and, in any case, a cynical consolation to realise that the Spanish Civil War, otherwise the cause of so many horrors and calamities, promises to become a fertile source of instruction for the student of international law. The decision of the House of Lords in *The Cristina*, [1938] 1 All E.R. 719, contains ample material for a thorough re-examination of the present position of a far-reaching problem of law.

On 14th July, 1937, the defendant, the Spanish Government, represented by the Spanish Consul at Cardiff, took possession of *The Cristina*, a ship flying the Spanish flag, registered at the port of Bilbao and owned by the plaintiffs, a Spanish company carrying on the business of shipowners at Bilbao. The defendant acted in pursuance of a Spanish decree of 28th June, 1937, requisitioning all vessels registered in the port of Bilbao. At the date of the decree *The Cristina* was not within Spanish territory. The plaintiffs issued a writ *in rem* claiming possession of the ship. The defendant contested the jurisdiction of English courts and asked to set aside the writ. This application was successful.

The case thus gave an opportunity for the House of Lords to review a number of recent decisions of the Court of Appeal and to make an authoritative pronouncement on many aspects of the wide problem of the immunity of a foreign sovereign state from the jurisdiction of English courts. In the course of the last two decades the subject has been extensively discussed by foreign courts, in learned articles and by international conferences, and it has been treated in a very valuable Draft Convention with comments prepared by the Harvard Law School: See *Oppenheim* (Lauterpacht), 5th Edition, Vol. I (1937), p. 222, and the material there collected; add Niboyet, *Revue Générale de Droit International Public*, 1936, 525; Van Praag, *Revue de Droit International et de Législation Comparée*, 1934, 652; 1935, 100; Brookfield, *Journal of Comparative Legislation and International Law*, XX (1938) Vol. I; and especially Supplement to *American Journal of International Law*, 26 (1932), 451 *seq.*

It is, therefore, a matter of great regret that the decision of the House of Lords fails to supply a final solution of many questions on which an authoritative statement was anxiously awaited.

(1) It is an undoubted principle of law that, as Lord Atkin said (p. 720), "the courts of a country will not implead a foreign sovereign, that is they will not by their process make him against his will a party to legal proceedings, whether the proceedings involve process against his person or seek to recover from him specific property or damages." It was this principle which, in the opinion of their Lordships (with the possible exception of Lord Maugham), was broken. The plaintiffs' argument that an action *in rem*, directed against "the steamship or vessel *Cristina* and all persons claiming an interest therein," did not directly or indirectly implead a foreign sovereign government, was rejected by Lords Atkin and Wright in careful reasoning; the former adhered to the view which in harmony with Bankes and Scrutton, L.JJ., he had already expressed in *The Jupiter*, [1924], P. 236 in the Court of Appeal. Lord Maugham, however, who did not base his judgment on the same principle, expressed serious doubts whether "in such a case anything more is sought, or at any rate can be obtained than a remedy against the *res*," and he would have

preferred Sir Robert Phillimore's judgment in *The Parlement Belge* (reversed by the Court of Appeal (1880), 5 P.D. 197), according to which, proceedings against a state-owned Belgian ship did not involve a personal remedy against the King of the Belgians (p. 740).

(2) Lord Maugham based his decision on a ground which Lords Atkin and Wright, followed by Lords Thankerton and Macmillan, treated as a "second" and "separate" one, calling for separate analysis, though both grounds "alike are based on the general principles of international law according to which a sovereign state is held immune from the jurisdiction of another sovereign state" (p. 728). This second ground was, in the words of Lord Atkin (p. 721), that the courts of one country "will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control." In view of the fact that, as mentioned above, an action against the sovereign's property involves the enforcement of a personal remedy against the sovereign, it is not quite easy to understand why this is a second and distinct ground. Dicey's formula (5th Edition, pp. 193, 194) that an action against the property "is for the purpose of this rule an action or proceeding against such person" appears to be preferable as will appear in paragraph (7) below.

(3) Nevertheless, the real importance, and difficulty, of the decision lies in what was said about the pre-requisites and the ambit of that second principle. However often the opinions delivered by the five law Lords may be read, all that can be ascertained with safety as their *communis opinio* is the following rule: ships which, by reason of a requisition by a sovereign state (even if such requisition is effected while the ship is outside the jurisdiction of the requisitioning state), are proved to be under the control and in possession of that state and are, or are intended to be, devoted to public uses, are protected by immunity. But would the absence of any one of these circumstances have excluded the operation of the general rule? This is the question which future generations of lawyers will have to ask themselves, and, unfortunately, it would be hazardous to predict the accurate answer.

The first difficulty concentrates on the term "property" within the meaning of the principle. It is clear that ownership is not required. Possession is certainly sufficient according to Lords Atkin, Thankerton and Wright, but it would seem that Lord Maugham regards possession as essential.

This is not the view of Lords Atkin and Wright according to whom the material fact is the control over the ship (see at pp. 722, 732). Lord Wright said that the rule "applies to cases where the government has a lesser interest (than ownership) which may be not merely not proprietary, but also not even possessory."

Thus there arises this further question: is possession and/or control sufficient even in the absence of requisition or some similar measure, or is, on the contrary, requisition sufficient even without possession and/or control? Lord Wright seems to favour the latter view (p. 732): "In my judgment . . . the requisitioning of the *Cristina* under the decree of June 28, 1937, gave the Spanish government a right or interest in the *Cristina*, whether called property or not, which was immune from interference by the courts of this country"; he went on to explain that it was immaterial that at the time of and ever since the decree the *Cristina* was outside Spanish waters. On the other hand, Lord Maugham seems to prefer the

former view and to attach, in this connection, no importance to the requisition: "it seems to me that the claims by the Spanish government for immunity from any form of process in this country may extend to cases where possession of ships or other chattels had been seized in this country without any shadow of right, and also to cases where maritime liens were sought to be enforced by actions *in rem* against vessels belonging to a foreign government and employed in the ordinary operations of commerce. For my part, I think that such a claim ought to be scrutinised with the greatest care. . . ." (p. 737). In a very recent decision the Supreme Court of the United States also requires actual possession and regards mere "attachment" as insufficient: *The Navemar* (1938) 32 *American Journal of International Law* 381, affirming the decision of the Circuit Court of Appeals, 2nd, which is reported in 59 Ll.L.R. 17.

The question whether the interest in the ship must be acquired without a breach of the peace, was apparently left open by Lord Wright (at p. 731) though in another connection he spoke (at p. 733) of the sovereign's "immunity even in respect of conduct in breach of municipal law." Both Lords Thankerton and Maugham however expressly pointed out (pp. 733, 736) that the defendant obtained possession without a breach of the peace.

In the present case the defendant Government had proved the fact on which it relied to show its right in the ship. The question whether a bare assertion would have been sufficient, was apparently answered in the negative by Lord Maugham (at pp. 738, 739), although it is not quite clear how far his observations apply to a sovereign state as a plaintiff, which is of course a different matter, while Lord Wright was content to state that he hesitated to give an affirmative answer (p. 731, but see p. 736). On this point, too, see *The Navemar, ubi supra.*

(4) These matters, though very involved, may be of minor practical importance in view of the fact that they do not appear to have ever presented serious difficulties in the numerous cases decided in the past by Judges of first instances and the Court of Appeal. But it is vitally important to know (*a*) whether it is an essential pre-requisite of the immunity of state-owned property that it is designated for public uses or whether the immunity exists even if it serves private purposes; (*b*) how the line of demarcation between both descriptions of uses is to be drawn; (*c*) whether, if an exception exists in case of a designation for private purposes, it requires general or more limited application.

(5) There exists a wide-spread school of thought accepting the idea that, to use general terms, sovereign states are not entitled to immunity in so far as they pursue ordinary trading purposes on the same basis as, and in competition with, private persons. It appears that the Supreme Courts of Italy, Belgium, France, Austria and Egypt and apparently also Spanish lawyers take this view, while in the United States of America, Germany and, with much hesitation, Switzerland, the principle of immunity is upheld without qualification; see the literature above referred to and add: Italian Corte di Cassazione, 16th June, 1934, *Giurisprudenza Italiana* 1934, I, 1, 976; 3rd August, 1935, *Foro*, 1935, I, 1387; Cour de Bruxelles, 24th May, 1933, *Clunet*, 1935, 1034; Trib. Civ. Alexandria, 14th January, 1932, *Clunet*, 1935, 195; Swiss Federal Tribunal, 28th March, 1930, Official Reports 56, I, 237; as to Spain see Spruth, *Gerichtsbarkeit über Fremde Staaten* (1929) at p. 49; see also Cour de Poitiers, 26th July, 1937, and Cour de Rouen, 7th December, 1937, S. 1938, II, 17, with note by Rousseau. Moreover, the International Convention for the unification of certain rules

concerning the immunity of state-owned ships of 10th April, 1926, and the Harvard Draft Convention accepted the former doctrine. In this country, the point has never been decided. It was raised by Counsel in *The Porto Alexandre*, [1920] P. 30, but disposed of by the Court of Appeal by a very extensive interpretation of the term "public uses."

In the House of Lords opinions were divided. Lord Atkin (at p. 721) said that the immunity extends both to property used only for the commercial purposes of a sovereign and to personal private property, and the same view was taken by Lord Wright (pp. 733–735), though he did not fail to note the severe and, in his opinion, justifiable criticism to which it is open. On the other hand, Lords Thankerton, Macmillan and Maugham more or less outspokenly adopted the opposite doctrine, disapproving of, or at least holding themselves free to reconsider, the decision in *The Porto Alexandre, supra.*

The solution of this problem depends not so much on legal reasoning as on expediency. From a purely legal point of view one would have to ascertain whether the leading judgment of the Court of Appeal in *The Parlement Belge* (1880), 5 P.D. 197, was meant to establish "the absolute exemption of all property owned by the sovereign, and not the exemption of some property only" (Lord Thankerton at p. 724), and what consequences follow from the fact that "there is no proved consensus of international opinion or practice to this effect" (Lord Macmillan at p. 725). One would then have to decide whether the immunity of a sovereign state is a rule or an exception to a rule; if it is a rule, the absence of an established international practice would not exclude the trading sovereign from immunity, but if it is an exception, the same fact would necessitate a return to the general principles of jurisdiction. In the last resort the matter will turn on expediency; the choice lies between the enforcement of legal process or diplomatic representations. In this connection one will have to take account of the words spoken by Lord Maugham a few days before he became Lord Chancellor (p. 737): "In these days, and in the present state of the world, diplomatic representations made to a good many states afford a very uncertain remedy to the unfortunate persons who may have been injured by the foreign government."

Moreover, Lord Maugham suggested a very interesting principle of reciprocity (p. 739):

> "In relation to such a rule as the one now under consideration, the word 'comity,' whatever may be its defects in regard to other rules of private international law, has a very powerful significance. Neither justice nor convenience requires that a particular state should decline to grant justice to its own nationals who have been injured by ordinary commercial vessels belonging to foreign governments if those governments are not willing to extend a similar immunity to the similar vessels of the first state. Nor can anything much more absurd be imagined than that, for example, England should decline to give legal redress against a Spanish trading ship belonging to that government while such an action would be allowed to proceed if the ship were found in port at Genoa, or indeed, for all we know, at Valencia."

In 1935 the bold argument was addressed to the Austrian Supreme Court that the defendant German Government was not entitled to immunity owing to its persistent disregard of international law. The Court

rejected the argument on the ground that it could not enter into a discussion of politics (22nd January, 1935, *Clunet*, 1936, 438). In 1938 the tragedy of this almost stubborn faithfulness to the rule of "international law" has become so overwhelming that one can hardly fail to welcome the principle suggested by Lord Maugham.

(6) If the distinction exists, it becomes necessary to define the method of drawing it. In accordance with the words of Brett, L.J., in *The Parlement Belge* (1880), 5 P.D. 197, 214, 215 the House of Lords asked itself whether the *Cristina* was dedicated to public uses. The answer was in the affirmative, and it therefore was not necessary to consider whether, if the ship had not been so dedicated, the result would have been different. Lord Wright explained (p. 733) "that the circumstances in which the respondent took possession of the *Cristina*, particularly in view of the recitals of the decree" made the dedication to public uses sufficiently evident. Lord Maugham (p. 741) hesitated "to take the view that a requisitioning decree relating to all vessels registered in an important port, whether large or small, whether built for pleasure or profit, is itself sufficient evidence of an intention to devote the vessels to public uses." But he found that the special circumstances of the civil war in Spain allowed an inference in favour of such dedication.

If the test really is whether or not a vessel is *publicis usibus destinata*, the result was probably inevitable. But that test is unsatisfactory, because all activities of a state are in the last resort intended to serve public uses. On the Continent it is usual to distinguish between claims arising out of an act done *iure imperii* (actes de pouvoir) and claims relating to acts done *iure gestionis* (actes de gestion). This distinction is certainly not entirely satisfactory either, but it is preferable because it has regard to the nature of the act rather than to the purposes which that act serves and which are often indistinguishable from mere motives.

It cannot be overlooked, however, that neither of these definitions readily applies to claims concerning the *title* to "property," and it is indeed important to note what Lord Wright said as to the construction of the relative provision of the International Convention of 1926 (p. 735): "its effect is apparently limited to claims in respect of the operation of such ships, or in respect of the carriage of cargoes in them. Thus, it would affect claims *in rem* for collision damage . . . or for salvage . . . or for cargo damage . . . , but, it may be, not claims for possession such as that in the present case."

(7) If it should appear that the absence of a dedication to public uses involves an exception to the general rule of immunity, the question arises whether this exception affects only the operation of the "second" principle according to which there lies no action *in rem* against the sovereign's property, or whether it also encroaches upon the first principle exempting the sovereign from being impleaded. One should think that the exception, if it exists, requires general application. It would be absurd to allow proceedings against the sovereign's trading vessel for collision damage, but to disallow an action against the sovereign for collision damage done by his motor lorry. Particularly Lord Atkin (p. 721), but also Lord Wright must be understood to mean that in their view "possible limitations of this second principle" only are involved. But Lord Thankerton examined the question "whether the proposition that the foreign sovereign state cannot be impleaded is an absolute one, the real criterion being the nature of the remedy sought" (p. 723). On the Continent, it seems to be free from

doubt that qualifications of the principle, if any, require general application.

F. A. MANN

The Law Reform Act, 1934—The Fatal Accidents Act—Loss of Expectation of Life

In Vol. I of this journal attention was drawn (at pp. 239, 247) to the troublesome questions which have arisen in connection with the above subjects, The newspapers, the law reports, and even journals such as *The Economist*, bear witness to the increasing difficulties which the Judges are experiencing in grappling with the consequences of the Act of 1934, the decisions in *Rose* v. *Ford*, [1937] A.C. 826, and *Flint* v. *Lovell*, [1935] 1 K.B. 354, and the inter-relations between the Act of 1934 and the Fatal Accidents Acts.

Of the recent cases which deserve notice, *Morgan* v. *Scoulding*, [1938] 1 K.B. 786, is the most satisfactory. Lewis, J., wisely decided that the fact that the deceased died instantaneously should not complicate a legal situation already more than sufficiently complex. His Lordship pointed out that in these actions arising out of fatal accidents the wrong done is not, strictly speaking, the death, but the injury which may, or may not, sooner or later result in death. In any case, it is extremely difficult to envisage a death which is completely instantaneous; there must be a "split second" between the injury and the death. The damages awarded to the parents under the Fatal Accidents Act in respect of the contributions made by the deceased, aged 23, to the family budget were assessed at £300 and his Lordship took notice of the facts that the deceased was a bachelor not engaged to any lady and that he might have set up a separate establishment of his own later in life and thereafter made reduced, or no, contributions to his parents. For the loss of expectation of life the damages awarded were £1,000, which may be contrasted with the £1,500 awarded in *Turbyfield's* case (see Vol. I, p. 247) in respect of the death of a child eight years of age. The relation between the two sets of damages was not discussed in this case.

Feay v. *Barnwell*, [1938] 1 All E.R. 31, is an interesting case from the legal and the social points of view. The facts were that a blind man of 73 was injured, and his wife, 71 years old, was killed as a result of the defendant's negligence. Singleton, J.'s judgment does not indicate what proportion, if any, of the £250 awarded to the plaintiff in respect of his own injuries related to the loss of expectation of life. In assessing the damages payable to the estate for the wife's death under the 1934 Act, his Lordship referred to the variations between the damages given in other cases of a similar nature. He gave a lump sum of £600 as damages for the pain and suffering undergone by the wife during the three weeks between the accident and her death and for the loss of expectation of life, but did not deem it necessary to state how these damages were apportioned under the respective heads. His assessment of the damages payable to the husband under the Fatal Accidents Acts casts a most illuminating light on the number of factors of which a court has to take judicial notice. In the first place the wife's death not merely meant the cessation of the old age pension payments made to her, but also affected the payments made to the husband. Then it meant that a housekeeper had to be obtained and she "in the ordinary sense, is not as economical as the

wife," and has to be provided with a separate bedroom, not to mention "additional expense of one kind and another." A small sum in a co-operative bank in the name of the wife really represented the husband's savings; out of it debts had to be paid, and by agreement between the parties, his Lordship did not take it into account. There remained the loss to a husband of 73 "for whom everything was done by a healthy wife of the age of 71." "The expectation of life of both is inconsiderable. It is rather the joint expectation of life, and the risks of life, and of the health and ability of the wife to do what she was doing, that I have to consider. . . . I cannot see . . . why I should take a smaller figure than something in the neighbourhood of 5 years." "Doing the best he could," his Lordship assessed the damages under the Fatal Accidents Acts at £625.

But then arose the difficult question of the relation between the two sets of damages, under the Act of 1934, and the Fatal Accidents Acts, and their effect on each other. By reason of the award under the former, the estate of the wife was £600 better off than it would otherwise have been, and as that amount went to the benefit of the husband, allowance had to be made for it in the total damages to be awarded to the husband. His Lordship pointed out that it would be unfair to deduct from the £625 awarded under the Fatal Accidents Acts the whole of the £600 awarded under the 1934 Act, because some expense was entailed in the way of administration proceedings and "some duty is payable on it and there must be some expense." The duty and administration expenses were estimated to amount to about £25. So from the £625 awarded under the Fatal Accidents Act the sum of £600 less £25 (i.e. the award under the 1934 Act *minus* these expenses) was deducted, leaving a sum of £50 payable under the Fatal Accidents Act. In the result, the plaintiff recovered the following damages, apart from the special damages: (1) £250 for his own injuries, (2) £600 under the 1934 Act, and (3) £50 under Lord Campbell's Act. In other words, he got £650 for the loss of his wife, a loss estimated by his Lordship as resulting in a material loss to the plaintiff of at least £2 5s. a week. In assessing the justice of this award regard must be had to the fact that the plaintiff was 73 years of age and that the Court had estimated the remainder of the joint married life at five years.

A point of interest, and of considerable practical importance, to note about this case is that his Lordship reduced the damages under the Fatal Accidents Acts rather than those under the Law Reform Act. In *Rose* v. *Ford*, Lord Atkin suggested that where the dependants benefit under the 1934 Act their damages under the Fatal Accidents Acts should be docked, but Lord Wright said that recovery under those Acts should result in the *pro tanto* reduction of the amount of damages given under the 1934 Act for the loss of expectation of life, on the ground that one of the fruits of continued life is usually an increased provision for dependants.. If Lord Atkin's view prevails, the dependants may suffer, as they would, for instance, if the estate was insolvent; moreover, it will also mean that the defendants in these actions will have to bear a heavier burden than they would if Lord Wright's suggestion were adopted, because the full maintenance of the 1934 damages at the expense of those under the Fatal Accidents Acts will result in a greater amount of estate subject to estate duty than if the reverse method were adopted. This is clear from Singleton J.'s judgment in *Feay* v. *Barnwell*, for his Lordship, although he said he was following Lord Wright, in fact followed Lord Atkin, but, in preserving the 1934 damages at the expense of the other set of damages,

made allowance in the amount awarded under the Fatal Accidents Acts for the duty payable on the 1934 damages. Hawke, J., indicated *obiter* in *Dransfield* v. *Insulated Cables, Ltd.*, 54 T.L.R. 11, that had the matter arisen in that case he would have followed Lord Atkin's view. The final determination of this matter is one of considerable importance to Somerset House, particularly in its assessment of the duty payable where settlements have been made out of Court for a lump sum in respect of both sets of damages without any specific allocation of particular sums to each head.

Apart altogether from the question of the relation between the two sets of damages, the assessment of the amount of damages to be awarded for loss of expectation of life is proving a most difficult question. The relative health, happiness, social position, earning capacity, age and other characteristics of the individuals killed are matters which may or may not have to be taken into consideration and on none of them have the Courts yet spoken clearly. Health, happiness and age have been taken into account in these cases, but the drift of judicial opinion at the moment seems to be against taking into consideration the social status or the earning capacity. The references to health and happiness have been short and not very definite. On the question of age the Judges have expressed differing views, particularly in the case of infants. The amounts of damages awarded for the loss of expectation of life of infants have varied so considerably that *The Economist* has been driven to describe these cases as complete gambles. It will be recalled that in *Turbyfield's case*, Greaves-Lord, J., refused to base himself too squarely on the Registrar-General's tables in arriving at his assessment, and that view appears to carry the assent of some of his Lordship's colleagues, so much so that before long it may well be that parents may have to pay delinquent motorists for taking off their children! Charles, J., in a speech widely reported in the newspapers, reproved a jury for awarding £1,000 in respect of the loss of expectation of life of a child of three and suggested that £150 would have been amply sufficient. But in *Shepherd* v. *Hunter*, [1938] 2 All E.R. 587, the Court of Appeal declared that an award of £90 in respect of the death of a child of that age was clearly erroneous and ordered a new trial. The judgments of the Lords Justices are not very illuminating and MacKinnon, L.J., only assented with reluctance.

It is clear that the House of Lords must speak again if confusion is not to become worse confounded. We suspect that one reason for the present state of affairs is that, despite the fact that the 1934 damages are meant to compensate the loss to the deceased, and to avoid the delinquent motorist from deriving advantage from the fact that he has killed his victim rather than injured him, the damages do go into the pockets of the living and it is they who are being compensated. On the one hand are heard sentiments to the effect that it is a shocking thing that parents should derive pecuniary benefits from the deaths of their children in road accidents, and, on the other, that the delinquent motorist should be penalised for the loss and misery he has caused. It is easy to be wise after the event, but recent cases go to support the criticism that was made of the report of the Law Revision Committee which prepared the way for the 1934 legislation, that it should have directed more attention than it did to the question of what items of damage should survive to the estate.

D. R. Seaborne Davies

Income Tax and Rating Cases

Cartels, Pools, and such like price-raising or fixing organisations of producers or manufacturers have become in recent years a noteworthy feature of the present economic system; the consumer has often been unable to see how the commonweal has benefited from them. *Collins* v. *J. Adamson & Co.*, [1938] 1 K.B. 477, is interesting beyond its mere application of income tax principles in that it reveals some of the methods by which these organisations work. The respondents were members of a trade association formed to keep prices up by a pooling scheme; the association through a nominee acquired the assets, etc., of one of its members which contemplated sale to a non-association concern—the assets were then sterilised. It also advanced money to another of its members to enable it to obtain a controlling interest in a second non-association firm.

The respondents claimed that their share of these payments were admissible deductions for taxation purposes since they were made to get rid of a competitor (*B. W. Noble Ltd.* v. *Mitchell* (1926), 43 T.L.R. 102). It was, however, held that the payments were not allowable since they were of a capital nature; expenditure made in order to produce a capital asset, or one of an enduring nature, or to get rid of an onerous burden falls under this head even though the asset produced is of an impalpable or intangible nature. Finlay, J., considered himself bound by analagous decisions to this effect in *Atherton* v. *British Insulated, etc., Cables, Ltd.*, [1926] A.C. 205 and *Mallet* v. *Staveley Coal, etc., Co. Ltd.*, [1928] 2 K.B. 405.

A. Farnsworth

Solicitor and Client: Insurance Claim

Groom v. *Crocker and Others* was the subject of a note in *M.L.R.*, Vol. 1, p. 244, to which reference should be made for the relevant facts. The question in debate concerned the duty of a solicitor to his client when the client is insured under a motor insurance policy, and the solicitor has been appointed to act in proceedings against him by the insurer, who is also responsible for his remuneration. The Court of Appeal ([1938] 2 All E.R. 394) were in full agreement with the judgment of the Court below, holding that the obligation of the solicitor towards his client is not diminished by the method of his appointment and remuneration. His duty is to act in the joint interest of both insured and insurer. In the instant case the solicitor, by arrangement with the insurer, had entered an admission of negligence in the proceedings against the insured, although the latter had never instructed him to do so, and had, indeed, always denied that he had been careless. This neglect of the interests of the insured was held to be a breach of duty.

The Court of Appeal was indeed principally concerned with the question of measuring the damages, though of course the affirmation by all its members of the obligations resting upon a solicitor appointed in this way is of considerable importance. The question of the damage, however, gave rise to a real difficulty, for the duty referred to was considered to arise entirely from contract so that the breach of it could not give rise to any tortious liability. The damages therefore had to be measured in accordance with *Hadley* v. *Baxendale*, and the case furnishes further evidence that

measure of damages in tort and contract is not the same. The result was that the plaintiff recovered nominal damages only, apart from a successful and independent claim based on defamation. No actual damage could be proved to flow from the breach of duty owed by solicitor to client. The damages awarded and all the costs in the original proceedings had been paid by the insurers. The plaintiff had not forfeited his no-claim bonus, and his claim based on mental suffering and loss of reputation could not be based on an obligation founded in contract.

Before leaving this case it is perhaps useful to reflect upon the reasons which led the defendant to admit liability upon behalf of a client who he was perfectly well aware had never been negligent. The motive which actuated him is well described by Scott, L.J. (p. 407). The claim in the original proceedings was against two defendants, one of whom was of course the plaintiff in the instant case, the other party being the person who had been clearly guilty of negligent driving. The view of the solicitor who was looking at the matter entirely in the interest of the two insurers was that, if liability was admitted on behalf of the first defendant, the proceedings against the other defendant would probably be dropped. The case would then proceed against a party who had clearly not been blameworthy, and a sympathetic jury could be relied upon not to mulct him too heavily in damages.

The manoeuvre, of course, arose out of the existence of what is called a knock-for-a-knock agreement between the two insurers. The object of these agreements, which are now common form, was in the first instance to cut down the costs to the insurance companies resulting from their fighting each other in the courts. Their use to prevent a plaintiff from recovering just damages appears to be new and might be regarded as contrary to public policy. Scott, L.J., evidently had this in mind when at p. 407, he said that the sooner such an agreement comes before the courts for consideration the better. Actually in *Morley* v. *Moore*, [1936] 2 K.B. 359, such an agreement was before the court although in another connection.

R. S. T. Chorley

Road Traffic Acts—Avoidance of Policies

The Road Traffic Act of 1934 did something to strengthen the weakness of the provisions relating to compulsory third party insurance in the Road Traffic Act, 1930, but not enough. Insurers can still rely upon non-disclosure and misrepresentation, not only as against the insured but as against the injured third party for whose benefit compulsory insurance was introduced, provided they commence proceedings for avoidance without delay. Although decided upon an interlocutory application, *Merchant and Manufacturers Co. Ltd.* v. *Davies and Another*, [1938] 1 K.B. 197, furnishes a good illustration of this and shows that the courts do not intend to mitigate the severity of the Common Law rules as to non-disclosure when construing the Act of 1934. It would appear, indeed, that Parliament in Sect. 10 of that Act was simply putting the Common Law rule into legislative words. In this case the insured, who had been convicted of several not very serious traffic offences, had answered a question on this point in his proposal form inaccurately in that he had disclosed only one out of three convictions. In an action by the insurers for avoidance of the policy after an accident in which a third party had been

injured the defendants attempted to obtain by means of discovery of documents evidence of the fact that the plaintiffs had on previous occasions issued policies at normal premiums notwithstanding the existence of similar convictions. In the view of the Court of Appeal, however, this evidence was immaterial because the fact that on other occasions the plaintiffs had issued policies with knowledge of conviction could not be evidence that the failure to disclose was immaterial in the present case. It would appear, therefore, that the injured third party was left without any remedy, at any rate so far as the insurance was concerned. Sooner or later Parliament will have to insist upon the issue of a type of policy which as regards the interest of third parties shall be incontestable by insurers. The position in New Zealand, which is discussed elsewhere in this number, indicates a line of solution which might well be followed.

R. S. T. Chorley

Road Traffic Acts—Penal Provisions

A number of important decisions have also been given on the penal provisions of the Road Traffic Act, 1930. *Kingman* v. *Seager*, [1938] 1 K.B. 397, will be welcome as a common-sense appreciation of the realities of the situation. The appellant had been acquitted by justices on a charge of dangerous driving in the following circumstances. He had driven a heavy lorry on which there was a speed limit of 20 m.p.h., at a speed of between 30 and 40 m.p.h., along a stretch of road on which there was a crossroad, a bend, and the entry of a converging road. The road in question was a first class road and wide, and normally carried a heavy volume of traffic. The justices had acquitted on the ground that no other road users were in fact endangered, and that therefore the speed was not in the circumstances dangerous. The King's Bench, however, held that the offence is complete if there is potential danger to the traffic which might reasonably be expected to be on the road, and sent the case back for conviction. It has been too often the case that the police have waited until an accident actually occurred before taking proceedings, and it is to be hoped that this decision will encourage them to take steps to suppress the dangerous driving which is often indulged in by motorists. Humphreys, J., makes it perfectly clear that even permitted speeds may be dangerous in certain circumstances. In addition, he says, "where the speed at which a vehicle is driven is in itself a dangerous speed, no other circumstance need be taken into consideration."

On the other hand, the decision of *Evans* v. *Cross*, [1938] 1 K.B. 694, is at first sight severely technical. The appellant driving his car overtook and passed another on the bend of a road where a white line had been drawn down the centre. In order to do so he placed the whole of his car upon the wrong side of the white line. It does not appear from the report whether there was potential danger to traffic which might have been coming from the other direction, a point no doubt immaterial to the technical commission of an offence, but one from the common-sense point of view of some importance. By the Road Traffic Act, 1930 (Sects. 48 and 49), it is an offence to drive in contravention of "traffic signs," and "traffic signs" are defined as including "all signals, warning signposts, direction posts, signs or other devices for the guidance or direction of persons using roads, etc." The King's Bench were of opinion that "devices" must be construed

ejusdem generis with signs, etc., and that as a white line is not of the same character as a signpost the motorist should have been acquitted. But why, with respect, is a line painted on a post a sign while a line painted on a road is not a sign? This is not only a peculiar application of *ejusdem generis*, but appears also to ignore the word "includes" in the definition.

The Road Traffic case which has given rise to the most comment, however, including questions in Parliament, is *Croston* v. *Vaughan*, [1938] 1 K.B. 540. The claim arose out of a motor car accident resulting from the sudden pulling-up by the driver, defendant B. of a car which was one in a procession, without any indication of her intention so to do, other than the lighting up of the red stop light fitted to the rear of her car. She did this because the car in front of her stopped suddenly. As a result the car behind ran into her car and the car next behind that, which was driven by the defendant V. came violently into collision with the car immediately in front, and the plaintiff who was a passenger with him was injured. It was contended that the defendant B. was liable for the plaintiff's injuries because she had been negligent in not giving an arm signal as well as showing the stop light.

According to the Highway Code issued by the Ministry of Transport, "signals by drivers should be given by the arm . . . where mechanical indicators are not used." It is difficult to avoid drawing the inference from this that where mechanical indicators are used signals by arm need not be given in the view of the framers of the Highway Code. The defendant B. claimed that as her mechanical stop light had indicated her intention to pull up she was not under the obligation to give an arm signal. Porter, J., who tried the case, considered however that the defendant B. was chiefly responsible, and held her liable to pay two-thirds of the damages.

It was his view that she ought to have given an arm signal. The question whether this decision of fact, which certainly does not seem to have commended itself to motorists, was correct, was not really open in the Court of Appeal, but the majority of the Court did in fact approve of it, and their opinions as to the effect of the Highway Code are of considerable importance because the majority were of the opinion that compliance with the requirements of the Highway Code does not necessarily prevent a finding of negligence. It might be possible to justify this view in very exceptional circumstances, but in normal circumstances, and those in the instant case were certainly quite commonplace, a reasonable driver can hardly be expected to observe a higher standard of care than that indicated as proper by a Minister of the Crown after consultation with expert drivers.

It is of course very difficult to pull up suddenly in an emergency and to give an arm signal at the same time, and the stop light was presumably invented partly for this reason. Moreover, according to the view expressed by Porter, J., which was not dissented from by the majority of the Court of Appeal, it is "a wise and sensible precaution for everybody, whether they have a stop light or not" to give a signal by hand. With respect we find it impossible to reconcile this view, for which there is a good deal to be said in cases which do not involve an emergency with the standard adopted in the Highway Code. It is, of course, in reality the learned Judge's own opinion of what precautions should reasonably be taken. Both Greer and Scott, L.JJ., appear to take the view that the judge is entitled to act on his own opinion of what is correct motoring conduct. Greer, L.J., indeed, points out that the learned trial judge is an experienced motorist.

This is of course an illustration of a difficulty met with in a trial of all negligence actions in which the conduct complained of is to be measured by everyday rather than by expert standards. The correct criterion is not the judge's own standard of driving, which may well be above the normal, but that which is regarded as reasonable by motorists generally, and as to this, one would have thought that the Highway Code afforded the best evidence.

This case is also interesting because it affords an early example of the principles upon which the damages will now be apportioned where various defendants are found guilty of negligence in varying degrees, a course now made possible by the Law Reform (Married Women and Tort Feasors) Act, 1935.

R. S. T. CHORLEY

Recent Currency Cases

Economists are in the habit of talking about the "money veil" when they wish to characterize a situation in which questions of international trade and of the distribution of goods and services in general take the outward appearance of currency problems, a fact which not infrequently tends to obscure the real issue. Recent developments in English Private International Law suggest that the "money veil" is not by any means the monopoly of the economists, and that there are situations in which general problems of Private International Law appear in the cloak of special currency questions, and a number of cases decided during the last twelve months shows that the money veil has a tendency to lead to the same confusion in the realm of law which it is said to produce in the science of economics.

The difficulty which gave rise to the cases we are about to discuss arose from the peculiar way in which English Private International Law attaches legal relevance to the place of performance of an international contract. The place of performance has, in fact, two entirely different functions in Private International Law. In a great number of cases the place in which a contract is to be performed determines the proper law of the contract. This occurs (*a*) when the parties to an international contract expressly or by implication submit their agreement to the *lex loci solutionis*, and (*b*) when, in the absence of a selection of the proper law by the parties, the law of the place of performance is regarded by the Court as the system with which a contract has the most real connection. Examples are afforded by cases like *Chatenay* v. *Brazilian Submarine Telegraph Co.*, [1891] 1 Q.B. 79, and *Benaim* v. *Debono*, [1924] A.C. 514. Where, however, the proper law of an international contract is a system other than the *lex loci solutionis*, e.g. the *lex loci contractus*, the place of performance is still of importance, not, in this case, because it determines the proper law, but, as it were, in spite of the fact that it does not. For, it is generally accepted that the *locus solutionis* has a decisive effect on what is usually referred to as the "mode" or "method" of performance, though the substance of the obligation itself is governed by the proper law of the contract. If, for instance, goods are to be delivered during the "usual business hours" in France under a contract which is subject to English law, it is for the usage prevailing in France to determine what are usual business hours, though French law does not otherwise govern the contract.

It is with regard to this second function of the *lex loci solutionis*, that

the money veil exercised its confusing effect in a line of cases which began with the case of *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.*, [1934] A.C. 122. Where is the border line between "mode of performance" and "substance of the obligation" when it comes to currency questions? So much is clear: money has two entirely different aspects in connection with Private International Law. It is a measurement of value and a means of payment. When the law which governs monetary obligations is to be determined, it seems at first sight that in its capacity as a unit of value or unit of measurement the money in which an obligation is expressed is clearly part of the substance of the obligation, while the coinage or other means of payment in which the obligation can be discharged may very well be regarded as a question of the "mode of performance." It is submitted that, in the *Adelaide* case, the contract before the House of Lords, being nothing else but the relationship existing between an English company and its shareholders, was governed by English law, but, that the place of performance of this English contract was in Australia. Here, then, we have a case in which the *lex loci solutionis* is not the proper law of the contract, and, if it is true that the *lex loci solutionis* governs the money of discharge, that is the means of payment, though if it has nothing to do with the unit of value, then the first question to be answered in the *Adelaide* case should have been, whether the question at issue was one referring to money as a unit of value or whether it concerned discharge only. The learned Lords who decided the case, with the exception of Lord Wright and with the possible exception of Lord Atkin, were of the opinion that the Australian and English currencies were identical in their capacity as units of value, and different only as means of payment. For those who took this view it was nothing but consistent to hold that the defendant company fulfilled their obligation under the English contract if they discharged it in Australia in the means of payment determined by Australian law. The question was nothing but a matter of the mode of performance which was governed by the *lex loci solutionis* though it was not the proper law.

The real difficulties which came to be the starting point for the recent development are presented by the speech of Lord Wright which must apparently be regarded as the leading judgment in the case. Lord Wright held that the two currencies were different not only as means of payment, but also as units of measurement. Nevertheless, he came to the conclusion that the matter was entirely to be determined by Australian law, being the *lex loci solutionis*. This view is open to two different interpretations. It may either mean that the measurement of a monetary obligation is a matter which can be characterized as mode of performance, or, else, it may indicate that the province of the *lex loci solutionis* as such extends beyond the mode of performance into the sphere of the substance of the obligation. Both propositions are equally difficult to accept, since the measurement of a party's liability cannot by any stretch of language be called a method of the performance, nor has it ever been regarded as acceptable to hold that the substance of the obligation can be governed by any other law than the proper law of the contract.

The question thus raised though clouded by a thick money veil is a general question of Private International Law: Where is the boundary between substance of the obligation and mode of performance?

In the course of the year 1937 this question gave rise to an almost dramatic development which first led deep into the mists of confusion,

though towards the end of the year certain clear principles seemed to emerge. The importance of the first of these cases, *Auckland City Council* v. *Alliance Assurance Co., Ltd.*, [1937] A.C. 587, lies not so much in the actual decision of the Privy Council as in the way in which Lord Wright interpreted his own judgment in the *Adelaide* case. The facts were those of the *Adelaide* case turned round by 180 degrees. The proper law of the contract was that of New Zealand and the obligation was to be performed in England. The Privy Council held that the discharge of the obligation had to take place in English, not in New Zealand currency. This was only the logical consequence of the *Adelaide* decision. The creditor of a monetary obligation was allowed to enjoy the fruits of the same principle which the debtor had successfully invoked in the *Adelaide* case. The remarkable feature of this decision, however, was that Lord Wright seemed to adopt the line of reasoning followed by the majority of the Lords who had decided the *Adelaide* case in 1934. It seems that he steered entirely clear of the idea that the question had anything to do with the measurement of value, and, it is submitted that his judgment must be read as dealing with the matter as one of discharge exclusively.

The same problem appeared in an entirely different setting in the decision of the Court of Appeal in *St. Pierre* v. *South American Stores (Gath & Chaves) Ltd.* (1936), 42 Com. Cas. 363. This was one of the cases usually referred to as gold clause cases, though the essence of the decision was that a certain reference to gold in a Chilean contract was not to be regarded as a gold clause at all, but merely as the repetition of a statutory definition. It was, however, argued on behalf of the creditor, that, since the debtor was under a liability to remit the money to England, the question of the measurement of the monetary obligation had to be decided according to English law. The Court of Appeal left no doubt that this argument was wrong. The measurement of a monetary obligation was held to be a matter of the construction of the contract, to be governed by the proper law exclusively.

Even more important than this utterance of the Court of Appeal is the decision of the Privy Council in *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society, Ltd.*, [1938] A.C. 224. It was very fortunate indeed that a case should present itself in which the problem appeared unobscured by the money veil. The point at issue was, whether the rate of interest payable in Victoria under a contract, the proper law of which was that of New Zealand, was or was not affected by a statute enacted in Victoria reducing rates of interest. It is true that the decision of the Privy Council in favour of the creditor was partly based on the consideration that the Victorian statute itself did not claim application to the contract at issue. But, apart from this, Lord Wright who delivered the decision of the Court made it clear that the effect of the *Adelaide* case was to be strictly confined to matters of discharge. The rate of interest was held to be part of the substance of a party's obligation, and, in a case like the present in which the *lex loci solutionis* was not the proper law of the contract, the place of performance could not have any influence at all in this matter.

One might have thought that the decision in this case meant the final step out of the difficulties created by the money veil in the previous cases. It would seem as if it was no longer possible to argue that any matters outside the mere question of how an obligation is to be discharged can be affected by the place of performance, unless the law of the place of

performance happens to be the proper law of the contract. Unfortunately it is too early to come to this conclusion, for, in *British and French Trust Corporation* v. *New Brunswick Ry.*, [1937] 4 All E.R. 516, the Court of Appeal, purporting to follow Lord Wright's speech in the *Adelaide* case in preference to the later decision of the Privy Council in the *Mount Albert* case, applied the *lex loci solutionis* which was not the proper law of the contract to what was clearly a question of the substance of the obligation. This, again, was a "gold clause" case. It concerned the construction of a gold clause contained in bonds issued by a Canadian company, interest and capital of which were payable in England. The point of interest is not that the Court of Appeal construed the gold clause as a gold value clause, this being almost a matter of course, after the decisions of the House of Lords in *Feist* v. *Société Intercommunale d'Electricité*, [1934] A.C. 161, and in *R.* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*, [1937] A.C. 500. The notable feature of this case is that, after the judgment of the first judge had been delivered, two statutes were enacted, one by the Dominion of Canada and one by the Province of New Brunswick where the defendant company was incorporated. These statutes, obviously framed on the pattern of the Joint Resolution of Congress of July, 1933, retrospectively annulled all gold clauses, whether coin or value clauses. The Court of Appeal, therefore, was faced with this problem: Was the validity or otherwise of a gold value clause in a Canadian contract to be performed in England a matter of Canadian or a matter of English law, was it governed by the proper law of the contract or by the *lex loci solutionis*? There should have been no doubt that a gold value clause had nothing to do with the performance of a contract as such and that it regulated the measurement of the debtor's obligation. Following the line of reasoning adopted by Lord Wright in the *Auckland* and *Mount Albert* cases, and by the Court of Appeal itself in the *St. Pierre* case, one would come to the conclusion that the validity of a gold value clause cannot be affected by the law of the performance at all. Yet, in the *Brunswick* case the Court refused to apply the Canadian statutes and upheld the gold value clause.

We, therefore, arrive at the rather depressing result that while the money veil was lifted for a short time, it was again allowed to interfere with the delimitation of the provinces of the proper law and of the *lex loci solutionis* in the most recent of the cases considered.

It was necessary to deal with these matters in a rather abstract way. The number of very recent cases turning around these questions seems to show that these highly theoretical problems are of the greatest possible practical importance during a period of currency regulations and Governmental interference with monetary obligations. Unless confusion is to become worse confounded it is necessary to arrive at a clear notion as to which law and which Government is called upon to fix the measurement of monetary obligations. This is the only question which is likely to be of fundamental commercial importance. Exceptional cases apart, the question of discharge is not of the same vital importance. If it were possible to follow the lead given in the *Mount Albert* case, occasioned by a non-monetary question, but capable of most profitable application to so-called currency problems, it would contribute to clarity in the law of international finance and, at the same time, in the Private International Law of Contracts.

O. Kahn-Freund

Official Secrets Acts

No one would wish to alter the law so as to enable the press to publish confidential documents which are not intended for public perusal: but the offence alleged in *Lewis* v. *Cattle* (1938), 54 T.L.R. 721, which came from the Stockport court of summary jurisdiction on a case stated, was not the publication of confidential documents, but the refusal of information under section 6 of the Official Secrets Act, 1920. This is one of the inquisitorial provisions in which the Official Secrets Acts abound, and it should neither be interpreted liberally nor maintained in its rigour if a wide interpretation has to be given to it. It provides that it shall be the duty of every person to give on demand to a chief officer of police, or to a superintendent or other officer of police, not below the rank of inspector, appointed by a chief officer of police for the purpose, or to any member of his Majesty's Forces engaged on guard, sentry, patrol, or similar duty, any information in his power relating to an offence or suspected offence under the Act of 1911, and if any person fails to give such information he shall be guilty of a misdemeanour. In other words, a person is compelled to give any information, even to the extent of convicting himself of an offence, to a police inspector or a soldier on guard, sentry or patrol.

The offence alleged in respect of which information was sought was under section 2 of the Official Secrets Act, 1911. This section provides that if any person having in his possession or control any information which has been entrusted in confidence to him by any person holding office under His Majesty or which he has obtained owing to his position as a person who holds or has held office under His Majesty, or as a person who is or has been employed under a person who holds or has held such an office, communicates the information to any unauthorized person, he shall be guilty of a misdemeanour. The question in issue, therefore, was whether a police officer employed by a borough police force was a "person holding office under His Majesty." The Lord Chief Justice, speaking for the Divisional Court, did not go into the question in detail, but simply said:

> "In my opinion it is true to say that every police officer in England and Wales, whether he be a member of the Metropolitan police force, or a member of the police force of a county, city, or borough, holds the office of constable, and within his constablewick has all the duties and rights conferred by common law or statute on the holders of that office. He is required to take an oath of office, and his primary duty is to preserve the King's peace. It follows that a police officer is a person who holds office under His Majesty within the meaning of the Official Secrets Acts."

Does it so follow? To answer this question it is necessary to examine the statutory conditions on which an officer of a borough police force holds office. The question of the Metropolitan Police may be excluded. Police officers of that force are under the control of the Secretary of State and may be in a special position. We are concerned only with forces under the Municipal Corporations Acts.

Borough constables are appointed by the watch committees under section 191 (1) of the Municipal Corporations Act, 1882. The watch committee is a statutory committee of the borough council set up under section 190 of the same Act. Having separate statutory functions, however, it does not act directly, in respect of such functions, under the control of the council: *cf. R.* v. *Thompson* (1844), 5 Q.B. 477. By section 7 of the

County and Borough Police Act, 1856, constables are to perform such duties connected with the police as the watch committee may direct, and it may be noted that a complaint to the watch committee by a ratepayer in respect of an act of a borough constable is privileged: *Bannister* v. *Kelly* (1895), 59 J.P. 793. Section 191 (2) of the Act of 1882 (to which the Lord Chief Justice obviously referred) provides:

> "A borough constable shall be sworn in before a justice having jurisdiction in the borough, and when so sworn shall, in the borough, in the county in which the borough or any part thereof is situate, and in every county being within seven miles from any part of the borough, and in all liberties in any such county, have all the powers and privileges, and be liable to all such duties and responsibilities, as any constable has and is liable to for the time being in his constablewick, at common law or by statute, and shall obey all such lawful commands as he receives from any justice having jurisdiction in the borough or in any county in which the constable is called on to act."

The watch committee may frame regulations for preventing neglect or abuse and for making the constables efficient. The committee, or any two justices, may suspend, and the watch committee may dismiss, any constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same. The watch committee also has power to suspend and fine under section 26 of the County and Borough Police Act, 1859. If a constable is guilty of a neglect of duty or disobedience to a lawful order, he may be dismissed under section 194 of the Act of 1882. But under section 1 of the Police (Appeals) Act, 1927, a constable who is dismissed or required to resign as an alternative to dismissal may appeal to a Secretary of State.

It will be seen that the constable's relation to the watch committee is peculiar, and that he is not in the position of an ordinary servant of the council. The right of appeal, though unusual in form, is not unusual in substance, since other officials employed by local authorities are given rights of appeal. It may be noted, however, that it was held in *Tozeland* v. *West Ham Guardians*, [1907] 1 K.B. 920, that a senior poor law officer (who cannot be dismissed without the consent of the Minister of Health) is not a servant of the local authority for the purpose of making the authority liable for his acts under the Poor Laws. The exact position of a borough constable depends, however, on the sub-section from the Act of 1882 quoted above. It is clear (see e.g. 1 Bl. Comm. 355–57) that the constable has independent powers and rights as keeper of the peace. It is, of course, true, as Blackstone points out (1 Bl. Comm. 349–50) that the King is "by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace is kept, and to punish such as break it." But for this purpose the King confers jurisdiction on justices by commission. The constable has no commission, but is specifically appointed by an authority whose power is derived wholly from Parliament. Accordingly, while it is true, as McCardie, J., decided in *Fisher* v. *Oldham Corporation*, [1930] 2 K.B. 364, that an arrest by a constable without lawful authority does not render the council liable for false imprisonment, it does not follow that he holds office under His Majesty, unless it is to be assumed that every office for the preservation of the peace is an office under the Crown. It is, of course, unusual for powers and duties to be conferred upon officials directly—

though the reader of Dicey's *Law of the Constitution* would think the contrary—but cases are not unknown of officials with statutory functions which they exercise without control and for whose action nobody but themselves is responsible. Thus, an inspector under the Diseases of Animals Acts was (it is unnecessary to consider what is the position under the Agriculture Act, 1937) an officer of a local authority and was so referred to by legislation; but he had independent statutory functions, so that he did not render the authority liable for his negligence: *Stanbury* v. *Exeter Corporation*, [1905] 2 K.B. 838. Nobody suggested that he held office under the Crown.

The justices' decision, as stated in the case, was that the constable was in the service of His Majesty. The Lord Chief Justice assumed that this was a slip of the pen. It is possible, however, that the justices meant what their clerk said they meant. They may have assumed that when the Act spoke of persons holding office under His Majesty it meant persons in the service of the Crown. It cannot seriously be contended that a borough constable is in fact a servant of the Crown, for he is clearly a servant of the borough council or, alternatively, of the watch committee. In so deciding, therefore, the justices misdirected themselves. A High Court judge may reasonably be said to be a servant of the Crown since he is appointed by the Crown and (subject to the provision first inserted in the Act of Settlement) dismissed by the Crown. A justice of the peace may perhaps be a servant of the Crown, or at least hold office under the Crown, since he holds a commission from the Crown. A borough constable is appointed by and (subject to the Act of 1927) dismissed by the watch committee under powers conferred only by Parliament, and he holds no commission or other instrument from the Crown. The Crown has nothing whatever to do with him except to make a grant to the borough council in respect of his appointment if the council thinks fit to take it. It is submitted, therefore, that he is neither a servant of the Crown nor a person who holds office under the Crown.

In case of doubt there is, or used to be, a presumption in favour of the accused or, stating it more accurately, a rule for the strict interpretation of penal statutes. Here, as in most cases, the rule was not mentioned. These Official Secrets Acts ought to be far more strictly interpreted than modern administrative legislation; for if there is a "New Despotism" it arises not from the power of a local authority to have slum property demolished, but from the power of the police, aided and abetted by the Attorney-General, to offend against the principles of penal legislation.

The Home Secretary (H.C. Deb., 12 May, 1938) has repeated the assurance given in 1930 that the powers of section 6 would not be used except on the decision of the Home Secretary or the Attorney-General. He has added that they will not be used except where the information disclosed is itself of serious public importance. This does not bind chief officers of police, nor does it provide any security against the Home Secretary and the Attorney-General, who are, after all, politicians. It would be better to amend the Act.

W. I. J.

REVIEWS

INDUSTRIAL INSURANCE: An Historical and Critical Study. By Sir Arnold Wilson, M.P., and Professor Hermann Levy. Pp. xxxiii & 519. 1937. Oxford. Oxford University Press. **21s.** net.

This is a valuable example of a work which is all too rare, for it is a serious study of part of the borderland territory where law, economics, sociology and politics meet. It is an interesting and, on the whole, successful attempt to explore and bring into the light of day a very murky area. The authors make a useful team. They might have done even better if they had had assistance from a lawyer and from an analytical economist, for it is clear that their grasp of some of the difficult legal problems involved in the subject of industrial insurance is uncertain, while excellent as is their study as a piece of descriptive economics, there is an absence of that searching analysis of which the subject clearly stands in need.

The historical survey brings out many interesting facts and reveals that the so-called industrial insurance, which is in essence provision by working-class people for funeral expenses, goes back to the fall of the guild system which necessitated makeshift substitutes in the form of local burial clubs. These developed into the Friendly Society, a number of which still of course carry on the work, but the tendency is for them to be displaced by insurance companies of which much the most important is the famous Prudential—incidentally the pages of this book show that this great organization is much the best managed and go-ahead of the concerns engaged in this type of business. The most significant fact which emerges from this historical study is the length and comparative lack of success of the legislative attempts which have been made to control the system, commencing with an interesting but abortive Bill of 1807.

What are the evils that have called for action? Undoubtedly the most serious of them is the enormous number of lapsed policies with a grave consequent wastage of the exiguous incomes of working-class people. It is not generally realised that something like half the policies taken out are not kept up. Their holders, of course, belong to that section of the community in which employment is uncertain and some failure to pay premiums is, therefore, to be expected. There can, however, be no reasonable doubt that the excessive rate of lapses is correctly diagnosed by the authors of this book as being due to the high pressure salesmanship which exists in the business. It is an essential feature of industrial insurance, as practised in this country and in the U.S.A., that the work of obtaining business and collecting premiums is carried out by house-to-house canvassing, mostly among the women. The agents with significant exceptions are paid by commissions which are especially high at the inception of the insurance. These agents are for the most part ill-educated and untrained for their work, coming to it after failure in many other walks of life. The chances of unscrupulousness are, therefore, high, and it is clear that the average of practice could only be acceptable in a business where low standards prevail. The authors give numerous examples which leave one with the feeling that radical reform is imperative, making it quite clear that a very large number of people are persuaded to take out policies which it is very unlikely that they will be able to keep up.

The system just referred to is naturally exceedingly expensive; at one time over half the premiums collected went in costs and profits and,

although this figure has now been reduced to an average of about 35 per cent; among many of the collecting societies (Friendly Societies) it is still over 40 per cent. Another evil which follows inevitably from this system, as organized in this country, is the illegal policy. There are said to be eighty million policies in existence, and it is quite obvious that in the majority of these cases there can be no valid insurable interest. Until the present century, indeed, practically the whole of the business was carried on on a basis which was technically an illegality, because the moral obligation to provide a funeral for one's near relations was not insurable. That was no doubt a defect in the law, and most people have welcomed its reform. The various statutes which legalise these practices, however, bear too much the stamp of whitewashing to be altogether satisfactory. Moreover, they are couched in such vague terms, allowing insurance to a reasonable amount for funeral expenses that, combined with the long history of illegality, a situation has resulted which almost appears to be beyond immediate control. The English are particularly prone to gambling, and this evil has never been rifer than at the present time. Many of those who take out these policies often on the lives of not very close relations might be indignant at such an accusation, but when, as is often the case, we find one man holding ten or more policies on different relations—not because he ever expects to pay for their funerals, but simply in hopes of a windfall—it is not only gambling, but gambling of a particularly vicious type.

It is clear that in certain respects progress has been made, particularly by the Prudential. A good deal of it, however, is little better than window-dressing as in the case of the automatic issue of paid-up policies in respect of lapsed policies when premiums have been paid over a certain period. These are in so many cases worth no more than a few shillings, and can hardly be worth the trouble of claiming payment. Even so progress has been slow, and it is not easy to see how it can be carried much further so long as the business is conducted by house-to-house canvassing on commercial lines. Our authors realise this and can find no other solution but the nationalisation of the business through an extension of the benefits conferred by the National Health Insurance Acts, a conclusion which must be regarded as of considerable significance coming from so eminent a Conservative as Sir Arnold Wilson, M.P. The obstacles to reform are enormous. In the first place, the funds held by insurance companies and societies are as much as one-fifth of the total capital of all the trading companies registered under the Companies Acts. This means that they wield a great financial power and are able to bring considerable pressure to bear on any Government. It is significant that at the time of the introduction of national health insurance, when they were much less financially powerful than to-day, they were able to force Mr. Lloyd George to drop his proposals for including funeral benefits in the National Health Insurance Bill, of which they formed an integral part. On the other side are the insurance agents, a well-organised and powerful body of men, numbering some seventy thousand, who have obtained a vested interest in the present system. In view of their close relationship with the electorate they constitute a political power whose importance has perhaps been overlooked, for neither a Conservative nor a Labour party can afford to quarrel with them.

Space does not permit me to touch on many of the interesting matters raised in this very thorough study of the problem, one which is likely to

remain a standard for many years. It may be permissible, however, to add something more on the legal aspects of the problem. In the first place, one is struck by the eminent services rendered to the poor people of the country by the Chief Registrars of Friendly Societies, an office which under various titles has been in existence for a century. The registrars have been given considerable rights of inspection, and of arbitration in connection with disputes arising in connection with policies. Men like Tidd Pratt, Ludlow and Brabbrook, whose names are almost forgotten in their own profession, have rendered services to the community of no less value than those of the better-known judges of the High Court. Our authors give them the highest praise, and it is clear that the improvements in the system which have already been noticed were, to a considerable extent, due to their great-heartedness, untiring efforts and acumen.

In connection with the disputes that come before them the Chief Registrars have built up their own jurisprudence, and it is one that would repay a more careful examination than the authors of this volume are able to give to it. The Chief Registrar has, for example, had the courage to depart from the principle laid down in the High Court in connection with other types of insurance that the agent who fills in a proposal form for the proposer acts on that person's behalf in so doing and not for the insurer. It is obvious that the High Court doctrine, if applied to industrial insurance, would frequently work dire hardship. Again, the question whether a policy for funeral expenses is a contract of indemnity has not been settled. The point is not argued here though authority for the affirmative view is quoted. Much though there is to be said for this on theoretical grounds, it would be quite unworkable in practice, and it is interesting to note from a valuable review of the present work in the current issue of the *Law Quarterly Review*, by Sir G. S. Robertson, till recently Chief Registrar, that the view in the Registry is to this effect.

Although it may sound ungracious to close on a note of criticism, it should be stated that the book suffers to some extent from repetition, and would have benefited from pruning and compression. There are also a number of obvious mistakes; several of these are corrected on an erratum slip, but sufficient remain to call for comment especially in a work which emanates from the Oxford Press.

R. S. T. Chorley

CRIME AND THE COMMUNITY. By Leo Page. London, Faber and Faber, 1937. 394 pp. **12s. 6d.**

The English legal profession may be congratulated on the fact that this book has been written by a barrister. The author—who is also a Justice of the Peace—has admirably succeeded in combining the moderation and legal knowledge of the lawyer with the reforming zeal and the special experience of the penologist. Up to his time, the existing body of prison experts has, in the author's view, been chiefly composed either of prison officials, who, on the whole, "are precluded from giving expression to their views," or of ex-prisoners, whose statements the author regards as "for the most part grotesquely distorted pictures of prison life in this country." Realizing this gap, he took the best course open to him under the circumstances: he obtained the permission of the Prison Commissioners to enter such of their institutions as he wished and to talk freely with officers and inmates, and he made the fullest and most conscientious use

of this privilege. This licence, by the way, is in itself sufficiently indicative of the great changes that have come about since the time when Hobhouse and Brockway, in their Foreword to *English Prisons To-day* (1922), called the Prison Commission "one of the most secluded of Government departments." On the other hand, it is hardly necessary to say that the author's impartiality has not in the least been affected by the official assistance he received: the book is not a mere record of facts; it contains pertinent criticisms of the prison system, though it justly praises the great achievements of the Commissioners and other officials. Nobody, however, has recognized better than the author that the occasional visitor, however experienced and shrewd an observer he may be, can never see the whole of the picture. He quotes with approval an ex-prisoner's dictum: "So many prison reformers know everything about prison except what it feels like to be inside. That knowledge is the most essential part of a reformer's equipment." An idea that might perhaps be open to an interpretation which would carry it far beyond the narrow limits of prison problems: the present reviewer, in the course of his practical work, has become more and more converted to the categorical imperative of a famous teacher of criminal law and legal philosophy that nobody can really hope to understand the mind of a criminal, and that, therefore, nobody ought to be a criminal judge who had not himself experienced every possible kind of hardship and temptation. To return to realities: What practical results has the author gathered from his visits to the Prevention Detention Institution at Portsmouth, to three convict and five local prisons, including the Women's Prison at Holloway, the Boys' Prison at Wormwood Scrubs, and the "experimental laboratory" at Wakefield? His final conclusion is that the English prison system "need not fear the challenge of comparison with that of any other country"—a conclusion which, if anything, is probably too modest. The present reviewer would be at a loss to name another country that could justly claim even equality with the modern English system taken as a whole. This may, on the one hand, be due to lack of money, of a sufficiently high standard of life in general and of a trained and incorruptible personnel—or, on the other hand, to a too rigid adherence to antiquated principles, as solitary confinement, etc., or to political tenets irreconcilable with reasonable prison administration. The striking observations made by Miss Margery Fry and other representatives of the Howard League on their recent tour round the prisons of South-Eastern Europe (see *Howard Journal*, January, 1938) speak for themselves.

Nevertheless, even in this country, there is, in the author's view, still some room for improvement. To mention some of his major criticisms: Many of the local prisons, of which Oxford is singled out as representative, are too small to permit effective segregation and training of the different types of inmates, which is particularly unfortunate as these prisons receive not only short term prisoners, but also some convicts and boys awaiting committal to Borstal. As regards the large local prisons of the Pentonville type, there is nothing new in the author's condemnation of their fortress-like buildings and in his plea for the transference of most of the women from "the gigantic walls of Holloway" to cottage homes. The lack of adequate opportunities for physical exercise is deplored, especially at Wormwood Scrubs and in a long-term institution like Portsmouth. The author, however, reserves most of his critical comments for the question of suitable employment. Though very careful to emphasise his lack of

expert knowledge as well as the exceptional difficulties which the authorities have to face, he finds most of the prison workshops "so elementary as to be of little value either in teaching a trade or of fitting a man to earn his living by improving his existing knowledge." As exceptions to this rule he mentions some of the workshops at Wormwood Scrubs and those at Maidstone. Like most visitors, he is most favourably impressed by the new earning schemes and the camp system at Wakefield. Of Dartmoor he says that, although "the system could not be administered with greater consideration and humanity," it is the only prison in which "the prisoners are almost openly regarded as irreclaimable and hopeless. . . . I cannot think that any prisoner is improved by Dartmoor, and I can easily believe that many are made worse." Much more hopeful are the impressions which the author received at Portsmouth: here he found an atmosphere of comparative freedom, and the results appeared better than those at Dartmoor, although the human material is largely the same in both institutions. In his attempt to explain this contrast, the author employs what is one of the shrewdest observations in a book that is throughout rich in apposite remarks: "This refusal to surrender to force (under a strictly deterrent régime)—he says—is the same quality which in other circumstances and in better men we hail as heroism. If we break this spirit, we may destroy the one virtue in the man which, more wisely treated, may be the means to lead him to decency."

The author's practical suggestions deserve special attention in view of the forthcoming Penal Reform Bill. He recommends the establishment of three types of penal institutions: Class 1 for prisoners, irrespective of age, for whom purely reformative treatment is essential and sufficient, which, he thinks, would simply consist in an extension of Borstal and Wakefield methods to all prisoners of that type. Class 2—intended for those who have failed in Class 1 or are clearly unsuitable for it—still essentially reformative but more severe. Finally, Class 3 for incorrigibles, who ought to be segregated for life under fairly lenient conditions, instead of being turned out upon society after years of unconstructive and mainly retributive treatment. Such a system would mean, besides other changes, a distribution of the usual Dartmoor and Portsmouth convict type among Class 2 and 3, and its intrinsic logic is beyond any doubt. There is, however, one fundamental difficulty to which the author appears to pay perhaps too little attention. He appreciates, of course, that the old idea of detention for life for incorrigibles will receive the necessary support of the public only when it is clear that no stone has been left unturned before an offender is to be branded as incorrigible: "Under our existing system of penal institutions—he writes—I do not think it would be right and just to introduce immediately any general practice by which persistent offenders should be permanently deprived of their liberty. For at present there is no certainty that every offender has been given his chance in prison. . . ." Hence, his new scheme. Prison reform, however, is unthinkable without a thorough understanding of the prisoner himself, and this requires persistent research into the causation of crime. Penology and criminology must go hand in hand. It is probably this aspect of the matter that has been chiefly responsible for the fact that Preventive Detention, even within the narrow limits of the Prevention of Crime Act, 1908 (maximum sentence: ten years) has so seldom been used by English judges. The judges feel that they cannot assume so heavy a responsibility if they do not possess the scientific means of enabling them to answer with a

reasonable degree of certainty the crucial question: Who is an "habitual criminal" or, under Mr. Page's scheme: Who is "incorrigible"? The book has some excellent criminological chapters on "The Criminal as a Human Being" and on "Abnormal Cases," and the author attempts to illustrate by means of practical examples the various criminological types. Nevertheless, it may be doubtful whether case histories of the kind given in those chapters and in Appendix 2 would suffice to convince a judge that segregation for life was indispensable, and it might be particularly dangerous to attach decisive weight to the expert diagnosis of the police. What seems necessary at least in all cases which might possibly fall under Class 3 is a collection on scientific lines of all the significant facts concerning the prisoner's life history and the expert opinions of a psychiatrist and a social worker. This material should be placed before a "Treatment Tribunal" which might be constituted as suggested by recent American writers (for instance, Professor Warner and Dr. Cabot *Judges and Law Reform*, Chapter VIII).

HERMANN MANNHEIM

INTERNATIONAL LAW. A Treatise by L. OPPENHEIM, M.A., LL.D. Vol. I. PEACE. 5th Ed. edited by H. LAUTERPACHT, LL.D., Dr., Jur. Longmans, Green & Co., 1937. **45s.** net.

The task of reviewing a textbook on International Law is a difficult one in these days; it is not like reviewing a textbook on some branch of English Law. A book on International Law, the struggling law of a shifting and changing society, cannot be judged purely on its merits of juristic analysis. In that latter respect, the present edition of Oppenheim is a supreme achievement. For lucid exposition, for a discussion, however brief, of practically every problem and controversy of International Law, and, last, not least, for an amazingly comprehensive bibliography, the fruit of encyclopedic scholarship as well as of excellent organisation, Dr. Lauterpacht's edition can only provoke the greatest admiration. In a book on so controversial and uncertain a subject, it would, of course, be easy to pick out a number of doubtful points, to approve or disapprove the author's or editor's point of view, etc. But wherever a view is taken, the controversy and all relevant literature is fully stated. The present reviewer feels that a more important point than that should be raised. He confesses frankly to a feeling of disappointment and dissatisfaction with the new edition, despite its extraordinary didactic and juristic merits and the admirable work done by its distinguished editor. The reasons for this can only be very briefly stated in a review. A textbook on International Law is bound to be based—far more directly and openly than textbooks on established branches of Municipal Law—upon the changing social realities of the international society, the rules of conduct for which it intends to state. To state these rules is, owing to the nature of the subject and its rudimentary state of development, not only a question of interpretation, but largely a piece of law-making. And therefore every international lawyer, however much he may attempt to disentangle himself from politics and to present a dispassionate picture of legal rules of conduct, must and does in fact have certain ideas on the nature and aims of the international society the law of which he puts forth. This may seem to some a trivial truth, but the fact is that International Law has become so much the object of legal analysis, mainly by lawyers schooled in the more secure and

established branches of municipal law, that the need to be aware of the essential social foundations of a system of International Law, paramount at a time of profound crisis, has been very much obscured. Technical rules become futile when the foundations become doubtful.

Oppenheim's treatise was written at a time when it was confidently believed that mankind was progressing slowly, but surely, towards the rule of law in international affairs, mainly through gradual increase of methods of peaceful settlement. This was believed to run parallel to a universal victory of democracy over autocracy. (*Cf.* Oppenheim, s. 51, a chapter written by the author and retained, without comment, by the editor.) After the war, the creation of the League of Nations and other international institutions seemed to further this process, and new editions of Oppenheim gave expression to this belief. But the rude and terrifying awakening from this belief which the last decade has brought, the tempest which sweeps over the "Christian Civilization" on which we are told the present International Law is built, only blows like a gentle zephyr, if it blows at all, in the 5th Edition, as, indeed, in most recent discussions of problems of international law. The growing anarchy is no doubt regretted by most international lawyers (and that only in the countries associated with the traditional attitude), but little effort has been made to examine the causes and effects upon the present system of International Law. And yet its foundations as well as many of its particular rules have been shattered, probably beyond repair. The new totalitarian ideologies imply and express a new attitude towards the basis of international society—and law; such international conventions as the Non-Intervention Agreement or the Broadcasting Convention of 1936 reveal a function of the state quite different from that presented in the textbooks, but international lawyers have hardly taken notice of it.

The new edition of Oppenheim is no exception to this attitude. It is only fair to say that the problem is a difficult one for the editor of an established textbook. But this book will be used by thousands of students, and what matters most is that they should see with all clarity the real problems of the international law of to-day, and not those of yesterday, or, perhaps, of to-morrow, even if that means the scrapping or rewriting of a recognised textbook. Now, the Whewell Professor is the last man to shirk rewriting where he thinks it is necessary. He has, in his own words, "deemed it proper, on many questions, to put forward views which differ from those propounded in the former editions of this treatise and which, in my opinion, are more in keeping with the changes which have taken place in International Law since the World War." An admirable purpose. But it is submitted, with all respect, that Dr. Lauterpacht, has taken note of the less important and ignored or at least belittled the really important changes. The changes which he emphasises are those which point to a progress of the rule of law, the League of Nations, the Hague Court, etc. But is that really the International Law that one can present as the law of to-day? The changes that really matter and are dominating the international life of this generation at least, and compared with which the interpretation of articles of the League Covenant is a subordinate and a transient matter, are, it is submitted, essentially two—

1. The growth of state control over the individual, a universal phenomenon, which makes the assumption, still maintained in both volumes of the 5th edition, of the freedom of the individual in economic and other matters, largely a matter of the past.

2. The challenge to the universal validity of the present international law produced by new forms and aims of state life, in particular by Fascism, and the consequent discrepancy between the members of the family of nations in their attitude towards fundamental social values, such as life, property, political freedom. It has yet to be thoroughly examined how far these matters affect international law. That they have a profound effect is evident. (The present reviewer has attempted to discuss some of the main problems in *British Yearbook of International Law*, 1938).

A due consideration of these vital matters would, it is submitted, necessitate the rewriting of large sections of Oppenheim, e.g. of:

1. The general introduction, in particular the chapter on the Dominion of the Law of Nations, the lessons of History and Others.

2. The chapters on State responsibility and on the position of individuals in International Law.

(In the second volume the chapter on Neutrality is most affected.) But it is obvious that, beyond these chapters, the whole question of collective security and international organisation is involved.

Professor Lauterpacht has partly or wholly rewritten many chapters, general and special; needless to say, all of them are admirable. The most valuable probably are those on the relations between international and municipal law and on general principles of law. In these matters Dr. Lauterpacht's monographs have done pioneer work. There is, of course, a conviction behind Dr. Lauterpacht's writing, and it permeates his edition of Oppenheim. It is the belief in the gradual progress of mankind towards the universal rule of law, through such agencies as the League and international tribunals. His profound knowledge of comparative law enables Dr. Lauterpacht to show how exaggerated the alleged discrepancies between the continental and the Anglo-American schools are. Only in the meantime a gulf deeper than that has opened: the discrepancies of political organisation and of social and human values in general. To that Dr. Lauterpacht devotes one entire page (296). Having quoted some Russian and German writers, he concludes that "these and similar intrusions of national policies into the sphere of International Law are essentially transient." Why is the dependence of legal rules on certain social conditions so often perceived more clearly in regard to the past than in regard to the present? Is the universality of International Law as taught by Oppenheim an eternal truth, in no need of proof? Dr. Lauterpacht admits the existence of a situation "in which the society of States is deprived of that community of political, juridical and ethical outlook which is the necessary condition of both the normal functioning and the full development of International Law. But," he continues, "while, in such periods, the growth of International Law is necessarily impeded, its principal function of regularising intercourse and of maintaining and enforcing peace continues to be capable of fulfilment and gains in practical importance." In my respectful submission, the first and the second sentence are utterly incompatible. Had Dr. Lauterpacht taken more account of the encroachment of the State upon many new spheres of life, that would be even more evident, since numerous relations formerly a concern of individuals, come under state responsibility and now become relations between state and state. Oppenheim himself, in ss. 57 and 29 (Lessons of the History of the Law of Nations and the Rights of Mankind), has made some interesting and pertinent observations, which obviously needed rewriting or comment in the

light of new developments. But these very chapters the editor has left untouched.

I am aware that a full realisation of these changes must destroy many time honoured notions and threatens the continuity of International Law. But no self-delusion of international lawyers can alter the facts, while it may prevent international lawyers from making their contribution to a clear perception of the foundations on which a fuller and more comprehensive International Law, such as many of us desire, is possible.

W. Friedmann

JURISPRUDENCE. By Sir John Salmond. Ninth Edition by J. L. Parker, M.A. Sweet & Maxwell, Ltd. (1937). Pp. 751. Price **£1 5s.**

Somebody has had a bright idea. If Salmond's Torts could maintain itself as a marketable book why should Salmond's Jurisprudence be allowed to retire from the consciousness of examination candidates? All that was necessary was that a Stallybrass should be found. He must obviously not be too cynical about Jurisprudence as part of the education of a lawyer, he must be able to read French and German, and he must be able to understand American scientific jargon. The publishers have found Mr. J. L. Parker. But Mr. Parker has not yet attained the eminence of Dr. Stallybrass, and so Mr. Parker's activities have been somewhat circumscribed. He is allowed an excursus here and there when his information runs over, but otherwise he has to be content with 385 brief notes and numerous parenthetic interpolations in the text. For publishers these large black parentheses are probably the most useful of all inventions in the way of punctuation. One can preserve the odour of sanctity clinging to a hallowed text, and at the same time introduce less respectable but more useful odours within the tight boundaries of brackets. This compromise is in no way objectionable where the doctored work is a statement of law which must be regularly modernised to be of any value at all. Its validity is highly questionable where, as here, the editor is dealing with an original and coherent contribution to the theory of law. Its disadvantages are obvious. The reader interested to discover what Salmond thought is continually distracted by the interjected counter-views of other authors. Nor is the editor's task a pleasant one. He can scarcely do justice to his own opinions or those of other authors, where he is forced to present them in a sort of addenda and errata. Perhaps Mr. Parker should take heart from the experience of the editor of the Law of Torts who succeeded in a few editions in producing his own revised text. Perhaps the next edition of Jurisprudence will see Salmond relegated from leading role to chorus.

There must be advantages in producing this kind of hybrid, no matter how uneugenic it may be academically. To students it will be a boon. Formerly by reading the seven hundred pages of Salmond they could acquaint themselves with only the author's views. Now, by no greater effort they can pretend to a knowledge of Kelsen, Duguit, Geny and a host of other eminent jurists. The student who memorises the editor's snippets on Continental and American philosophers can pass himself off in written examinations as a mental giant. The more enquiring reader will merely be irritated when told that "Kelsen regards all 'law' as derived from an initial hypothesis prior to the constitution of the state and not from its will or any other source or fact of enforcement." Why should he believe this? What does it mean? Actually no helter-skelter compilation of

assorted thoughts about law can mean very much. Even those surveys which are constructed according to a particular scheme, as, for example, Berolzheimer's *World's Legal Philosophies* or Hallis's *Corporate Personality*, are dull, misleading or incomprehensible. Mr. Parker deserves credit for informing what we fear is still an apathetic audience that some people other than Austin, Salmond, and Holland have said something about law. In particular we are pleased to find repeated reference to that excellent American series of translations, the Continental Legal Philosophy Series.

A good comprehensive student's introduction to Jurisprudence is still necessary. Mr. Parker is obviously just the man to tell us what positions have been reached on all fronts. The publishers must be convinced by his performance of a difficult and uncongenial task that he could do it, and do it well.

J. Gold

LES GRANDS PROBLÈMES DU DROIT. By Louis Le Fur. Paris, Recueil Sirey. 623 pp.

LAWLESSNESS, LAW, AND SANCTION. By M. T. Rooney, LL.B., A.B., A.M. The Catholic University of America, Washington, D.C.

These two studies, one by a distinguished French professor, the other by an aspirant to the degree of Ph.D., in the Catholic University of America, stand in close relationship to one another, and are symptomatic of the period, for they are both expositions of the "natural law" theory of law —not the natural law of the eighteenth century, which Professor Le Fur thinks paved the way for modern doctrines of state-absolutism, but the natural law of St. Thomas, from whom a widely-spread group of legal and social philosophers to-day derive fresh inspiration. The essays which are collected together in Professor Le Fur's substantial work were written over a long period of time, and they vary widely in importance. That upon the German legal philosophers of the nineteenth century, for example, being written round about the war period, suffers in balance in consequence, and presents little more than a travesty of the theories of Savigny and Jhering. On the other hand, there are essays embodying a number of shrewd criticisms of the work of Duguit and Del Vecchio. Professor Le Fur's own position, it is interesting to notice, does not suffer any substantial modification through this series of essays. His view is that the ultimate principles of natural law are constant, though their application may vary from age to age. He also believes implicitly in the possibility of an international society regulated by natural law concepts, and regards the attempt to establish a League of Nations as the natural line of evolution in social organisation from family to city state, and from city state to nation. There is, however, a certain lack of precision in his conception of the function of a supernational organisation. It is more than a "concert of powers," and it is less than a superstate. Apparently, however, he is not convinced that it should be a federation, and he does not define the position of the individual *vis-a-vis* this new entity. Still, Professor Le Fur has no use for absolute state-sovereignty. Limitations on it already exist, he declares, and there will be more in the future.

Miss (?) Rooney's thesis has an attraction entirely its own, for its careful and balanced restatement of the scholastic doctrine, and it contains

a full and carefully classified biography. Its treatment of the theories of Holmes and Maine require close attention. Maine, she declares, could not shake off the crude positivism of Bentham and Austin. As a result, his work has less significance than it might have had. Holmes, too, she thinks, suffers from the same fault. Of course, there can be no final compromise between social necessity and the principles of the natural law school, since the latter have really passed beyond the confines of juristic speculation altogether. Nevertheless, if only because of the interaction of law and morals, Miss Rooney's thesis commands at once attention and respect.

G. W. KEETON

THE STANDARDIZATION OF COMMERCIAL CONTRACTS. By O. PRAUSNITZ, LL.M.; Dr. jur. London: Sweet & Maxwell, 1937. Pp. xix and 185. **10s. 6d.** net.

English legal literature contains little or nothing on the law of standard contracts (or *pro forma* contracts, as they are sometimes termed). The reason for this is, in part, the reluctance of English lawyers to intervene in the domestic concerns of the great trading organisations which have sponsored this type of agreement. But it can also be explained by the fact that it is assumed that the general principles of the law of contract are sufficient to deal with any questions that may arise. It is, nevertheless, clear that contracts of this kind must be placed for many purposes in a class by themselves, since they give rise to problems both of law and of *Rechtspolitik* which are not met with in the case of ordinary simple contracts. The French have coined a special name for them, "*contracts d'adhesion,*" and there is a considerable body of continental case law dealing with the question of their interpretation.

From a legal point of view the main characteristic of these contracts is that they lend themselves very readily to the creation of difficulties in connection with their formation. A person who has not read or pretends that he has not read a printed form of contract is prone to allege either that he signed it under a mistake as to its terms, or that he has been tricked into signing it. A somewhat bizarre situation which arises not infrequently is where a party signs a form of this description drawn up in a language of which he is totally ignorant. From an economic standpoint the objection to these contracts is that they are so often dictated by an economic superior to his inferior who has no option in the matter but must accept the terms offered to him just as they stand. The householder who desires to be connected to the telephone is not, for instance, in a position to query the conditions in the form which the Post Office presents to him for his signature. From another angle these contracts are important because the clauses which they contain constitute a body of extra-legal rules which displace the ordinary rules of the law of contract. The arbitrator is elbowing out the judge from commercial litigation, and it may well be that these clauses (or *droit corporatif*, as they have been called) will to a large extent tend to eliminate the law from business transactions on a large scale. On the Continent this tendency has been foreseen and its possibilities have been explored by such writers as Raiser, Schwob, Ishisaki, and others.

It is, however, unlikely that men of business will ever be in a position to dispense with the law and the lawyer. But if the lawyer is to hold his own he must be in a position to understand the legal environment of standardised rules and to appreciate the kind of legal problem which

arises in connection with them. In this respect he will find Dr. Prausnitz's work of the greatest assistance and, what is more, he will enjoy reading it. It is never dull. The ideas which the learned author puts before his readers are novel and to an English lawyer of unusual interest. It will also help him to understand that comparative law is more than a mere form of legal pedantry or dilettantism and that if it is applied in the proper direction and with the correct emphasis it is a valuable aid to the elucidation of many problems of English law besides helping to indicate the nature of problems which are dormant but may at any time come to life.

Space does not permit of a consideration of the many matters which are dealt with in this book. The learned author has a happy knack of presenting both sides of a case and this makes his comparative study of this type of contract of unusual interest. The statements of the effect of continental law which run parallel to his discussion of the English cases are not over-elaborated or couched in a legal jargon derived from foreign sources which so often causes an English lawyer to turn away from comparative studies with distaste. This is emphatically a book which should be read by everyone whose intellectual or professional interests bring him into contact with the standard form of contract. Incidentally it provides very useful material for the law teacher in the shape of topics for discussion classes. Dr. Prausnitz is to be congratulated on a valuable contribution to the study of the law of contracts, and we venture to express the hope that he will follow the matter up further than has been possible within the space of his excellent monograph.

H. C. Gutteridge

TEXTBOOK ON THE LAW OF TORT. By Professor P. H. Winfield, LL.D. London, Sweet & Maxwell, 1937. **30s.**

Though it has been said by one whose name carries authority that the rank and file of the profession, immersed in the routine of practice, never attain to a conception of law as a reasonable and logical science,[1] none the less a mere practitioner may be permitted to confess a sense of excitement at the appearance of this new work on the law of tort. For, while the tradition of English Equity (as the Master of the Rolls has lately reminded us) runs to the achievement of Justice, the tradition of the Common Law goes to the making of Freedom. The common lawyers are indeed the architects of English freedom. One is nowadays vaguely conscious of a difference between the *liber et legalis homo*, the free and lawful man of the Common Law, and the insured or the insurable person who is the creation of the modern statutes. And Professor Winfield notes acutely[2] that the servant in early law had a *status*, then lost it, and has now regained it.

To name freedom is to introduce a matter of metaphysics. The Common Law is founded on the belief in the rational nature of man and in the natural and necessary freedom of an intellectual nature. The statement of Brian[3] which Dr. Winfield cites[4] that *comen erudition est que l'entente d'un home ne sert trie car le diable n'ad conusance de l'entente de home* is a statement of metaphysical principle which affirms the inviolability of the order of freedom,[5] and this principle gives rise to a fundamental principle in law:

[1] Holdsworth, *History of English Law*, Vol. II, p. 326.
[2] At p. 89. And see *Men Without Work*, Cambridge, 1938, at pp. 200, 286.
[3] Year Book, 17 Ed. IV Pasch., fol. 2, pl. 2.
[4] At p. 22. And see at p. 71: "Up to a certain point the Common Law does not touch upon metaphysics."
[5] Cp. Jacques Maritain, *Freedom in the Modern World*, pp. 25–26.

De his potest homo legem ferre, de quibus potest judicare. Judicium autem hominis esse non potest de interioribus motibus qui latent sed solum de exterioribus actibus qui apparent. Et tamen ad perfectionem virtutis requiritur quod in utrisque actibus homo rectus existat. Et ideo lex humana non potuit cohibere et ordinare sufficienter interiores actus sed necessarium fuit quod ad hoc superveniret lex divina.[6] Events outside of England at the present time show the importance of this distinction, and of the necessity for limiting human law and human judgment to external words and acts of which evidence can be given.

In ethics also as well as metaphysics the foundations of the law are well and truly laid. On the last page of his great *History of English Law* Maitland pays tribute to the men who framed the ethics of the Common Law: "It was the critical moment in English legal history and therefore in the innermost history of our land and of our race. It was the moment where old custom was brought into contact with new science. Much in our national life and character depended on the result of that contact. . . . Those few men who were gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean. They were *making right and wrong* for us and for our children."

It is perhaps unfortunate that our books on the Common Law display no considerable knowledge of the ethics or the metaphysics which guided not only Bracton and Parning and Brian, but also Littleton and Fortescue and Thomas More. The Common Law was for them common reason; as it came, for Coke, to be "the perfection of reason." And the law of reason corresponded with what was also known as the Law of Nature. One is aware that Professor Winfield has no use for the conception of the law of nature (or of reason) which, in his book on *The Sources of English Legal History*[7] he refers to "as a topic which has long since had its brains knocked out."[8] And yet a considerable Jurist, von Ihering,[9] has this to say of Aquinas, who made the law of nature the criterion of all human law and legislation: "This great man correctly understood the realist-practical and social factors in moral life as well as the historical. . . . In amazement I ask myself how it is possible that such truths, once they were uttered, could be forgotten so completely. What false roads would have been spared had they been taken to heart? For my part I should probably not have written my book had I known them; for the basic ideas I occupied myself with are to be found in that gigantic thinker in perfect clearness and in most pregnant formulation."

Professor Winfield is, however, in the tradition of the Common Law when he takes sides with the late Sir Frederick Pollock on the controversy as to whether our law is a law of tort or a law of torts. The formulation of the general principle by Brian, and by Littleton, J., in the case of Thorns[10] is familiar to readers of Holmes on *The Common Law*. Moreover, the general moral and legal principle "Do good and avoid evil" which was developed by Ulpian into the maxim *Honeste vivere, alterum non laedere, jus suum cuique tribuere* (so familiar to readers of Pollock on Torts) was raised by

[6] Aquinas, *Sum. Theol.*, 1^{a} 2^{ae}, Qu. 91, A. 4. This principle was invoked at his trial by St. Thomas More as an answer to the first count of the indictment which charged him with *silence*.

[7] At p. 315.

[8] Cp. Kacourec, in 30 *Illinois Law Review* at p. 548, who speaks of the law of reason or of nature as "the world's greatest legal illusion."

[9] *Der Zweck im Recht* (2nd Ed.) cited Grabmann, *Thomas Aquinas*, p. 161.

[10] Year Book, 6 Ed. IV, Mich. pl. 18.

medieval thinkers to a Christian standard "Do unto others what thou wouldest wish others to do unto thee."[11] This principle is repeated by Holinshead: "The wretches had utterly forgotten all law both divine and human; otherwise they would have been content to live under law and to do unto others as they would be done unto as the verie law of nature teacheth."[12]

The law being thus a law of Tort rather than a law of Torts, a difficult question arises as to the meaning of tort in English Law. Professor Winfield makes a brave attempt to define it but one doubts if his definition will hold. The Common Law Procedure Act defines a tort as a civil wrong other than a breach of contract and implies that the civil wrong is actionable at Common Law. Perhaps this is as good a definition as another.[13]

On the detail of Professor Winfield's treatment of the law it is not possible within the compass of a short review to do justice to his work. One ought, however, to express one's gratitude for the broad humanity that is shown everywhere and for the literary references that light up the pages of what, in the hands of another, might easily have become a dull work. On certain matters the law has been clarified (if that is the right word) since his work was written. Thus, the decision of *Rose* v. *Ford*[14] in the House of Lords goes contrary to the opinion that he expresses in the text. And the decision of *Morgan* v. *Scoulding*[15] will no doubt have come as a surprise to Professor Winfield as it did to others whom there is no need to name.

In connection with the case of *Gayler & Pope* v. *Davies*[16] (which is discussed at pp. 221–225) we think it is error to suppose that practitioners in "running down" cases were universally unaware of their ability to rely upon an action for trespass rather than an action for negligence in suitable cases. One of the newest King's Bench Judges, who was (and is) distinguished for his understanding of such actions, uniformly pleaded in trespass when the facts made it possible, and an undistinguished practitioner, who will perhaps be known to Dr. Winfield, made it a regular practice so to plead, but somehow the matter was not discussed in any reported case until McCardie, J., pronounced his *obiter dictum* in *Gayler & Pope* v. *Davies* (*supra*). In pronouncing this *obiter dictum* it is possible that he attributed to practitioners a more intimate knowledge and a more anxious use of the dictum of Lord Blackburn in *River Wear Commissioners* v. *Adamson*[17] than they really had. In connection with actions for negligence one may point out that the defence of inevitable accident[18] need not be specially pleaded.

[11] See Carlyle: *Medieval Political Theory in the West*, Vol. II, pp. 105, 180.

[12] Cited in *Shakespeare Rediscovered* by Comtesse de Chambrun at p. 255. The principle is adopted by Shakespeare in his play on Sir Thomas More:

"What would you think to be thus used? . . ."
"Faith he says true, *le us do as we would be done by*."

Cf. per Lord Atkin in *Donoghue* v. *Stevenson* ([1932] A.C. at p. 580): "The rule that you are to love your neighbour becomes in law you must not injure your neighbour. And the lawyer's question: Who is my neighbour? receives a restricted reply."

[13] Cf. *Webster* v. *Webster* [1916] 1 K.B. 714 where a *quia timet* action by a husband against his wife for an injunction only was held to be an action of tort within the meaning of section 12 of the Married Women's Property Act, 1882.

[14] [1936] 1 K.B. 90 C.A.; [1937] A.C. 826, H.L. Again, the case of *Wilson's* v. *English* [1938] A.C. 57, 84 has in effect overruled the decision of the Court of Appeal in *Fanton* v. *Denville*, [1932] 2 K.B. 309 (Winfield pp. 142–145).

[15] (1937), 54 T.L.R. 253. Cp. per Slesser, L.J., in [1936] 1 K.B. at p. 107.

[16] [1924] 2 K.B. 75.

[17] (1876), 1 Q.B.D. 546.

[18] Winfield, p. 48. Cp. *Yearly Practice*, 1938, at p. 319.

The section on defamation contains a challenging statement of the law on more than one disputed point. It was perhaps a slip which lead Dr. Winfield to say that defamatory matter conveyed to a parrot is slander *as to the communication of it to the bird.*[19] One is loth to attribute human intelligence even to a parrot. To whom then is there publication? As to broadcasting, the weight of authority in England and America seems to be that broadcasting from a written document is libel rather than slander, and likewise that *publication* of a defamatory gramophone record is libel.[20]

The opinion of Dr. Winfield in relation to *Cassidy's Case*[21] is well known and is supported by Professor Holdsworth, and I think Dr. C. K. Allen; but I doubt if their opinion is shared by practitioners among whom the ruling opinion seems to be that the mere publication of words that are proved to be defamatory is actionable, and that absence of negligence on the part of him who *publishes* is no excuse. The defence of innocent dissemination amounts really to a plea of "*never published.*" On another point of pleading, it is not *always* essential in libel to allege that the words were published "falsely and maliciously."[22]

But many of these points are disputable or are disputed, and it may well be that the Courts will justify the opinion which is offered by Professor Winfield, to the confusion of those who venture to differ from him. With his statement of the law in many chapters of this work we find no room for criticism or even for difference. Of particular value is his chapter on *Abuse of Legal Procedure* where he writes with authority: "The master of those that know." Everywhere, one finds evidence of those qualities which one has learned to associate with the name and writing of Professor Winfield, deep learning and acute thought and a certain irrepressible humour. It is a book to stimulate and excite all those who study or practise the Common Law, and for which the author deserves our thanks.

RICHARD O'SULLIVAN

CLERK & LINDSELL ON THE LAW OF TORTS. Ninth Edition, edited by SIR CHARLES ODGERS, M.A., B.C.L., J. CHARLESWORTH, LL.D., W. A. MACFARLANE, J. REGINALD JONES, and NORMAN BLACK, under the General Editorship of HAROLD POTTER, Ph.D., LL.B. London: Sweet and Maxwell Ltd. 1937. Pp. cxlii + 900. **£2 10s.** net (with *Chitty on Contracts* **£4 10s.**).

Ever since the first edition of *Clerk and Lindsell* appeared almost half a century ago it has been the leading practitioner's book on the law of torts, and that position it has maintained until the present day. But in the last 50 years the law on this subject has developed in such a way that a more systematic treatment of the subject is possible and is indeed called for than was possible in 1889. It is a matter for congratulation that the necessary work of re-adjustment has now been undertaken and been entrusted to such competent hands as those of the present editors. Dr. Potter is Captain of the Team and obviously has the gift of leadership, for only a stern disciplinarian could have overcome the danger of irreconcilable views appearing in a composite work of this description. Such conflicting views we have failed to discover. As a good captain should, Dr. Potter has

[19] At p. 259(*n*). Is defamatory matter communicated to a lion likewise slander?
[20] See the cases collected in Gatley on *Libel and Slander*, 3rd. Ed. at p. 5(*n*). Cf. Winfield, p. 260.
[21] [1929] 2 K.B. 331, Winfield, pp. 278–280.
[22] See Gatley on *Libel and Slander*, 3rd Ed., p. 497. Contra, Winfield, p. 271.

borne the brunt of the hard work of revision himself, but Sir Charles Odgers has dealt with the important topics of Fraud, Defamation and Malicious Prosecution, whilst Dr. Charlesworth, already well known for his work on Dangerous Things, has tackled Nuisance as well as the field which he has made his own.

There is no fear that *Clerk and Lindsell* will lose its place in the affection of practitioners as the result of the new edition. Dr. Potter has shown great ingenuity in the introductory chapter in tacking the new statement of general principle on to the old patch-work, and throughout the work has been well done. If we confine our remarks to criticism rather than to singling out special passages for commendation it is not that there is more to criticise than to praise, but that criticism may be more fruitful. The great fascination of the study of the law of torts is that it is a controversial subject, and a field of law which is in the process of development.

One general criticism is that there is so little reference to the literature of the subject other than the Statutes and Reports. True, it is a practitioner's book and not a student's book, and the Reports are authority, whilst the literature is not. But the practitioner may easily be misled unless he is told of the discussions which have centred round particular cases. Some reference, for example, should surely be made to the discussion of *Oakley* v. *Lyster* by Professor Goodhart in the *Law Quarterly Review*, to Thomas Beven's criticisms on *Baker* v. *Snell* in the *Harvard Law Review*, to the various opinions expressed as to *Hollywood Silver Fox Farm* v. *Emmett* by several learned writers in the *Law Quarterly Review*, and to the controversy about *Cassidy* v. *Daily Mirror Newspapers Ltd.* which may be illustrated by reference to 46 *L.Q.R.*, 1, 133 and 155. These cases may well prove a trap to the lawyer who has not read the literature to which they have given rise; similarly cases such as *Aitchison* v. *Page Motors* and *Parker* v. *Miller* may well prove a trap unless they are carefully explained. The present reviewer has looked for guidance as to the true *ratio decidendi* of these last two cases, but has not found it. There seems indeed to be a certain tendency to shirk difficulties, as instanced by the passing reference to consent as a defence in the case of a criminal tort (p. 26), the reference to *Brocklebank* v. *The King* (p. 38), and the failure to explain *Deen* v. *Davies*.

The absence of reference to the literature of the topic is particularly noticeable in the chapter on Dangerous Property, but in the present reviewer's opinion it is a weakness throughout the book. He has not, for instance, discovered any reference to Dr. Friedmann's important article on "Modern Trends in the Law of Torts" in the first number of this journal. Again, the treatment of Contributory Negligence is in many ways excellent, but a discussion of the true basis of the English doctrine on that topic would throw light on some of the difficulties involved in it.

Clearly the failure to refer to the literature of the topic is not due to ignorance of it, but to a set policy, for in many cases the results of other writers' contributions have been accepted. But it may be suggested that it would help the practitioner to know the reasoning by which a conclusion has been reached. He cannot always rely upon an *ipsi dixerunt* of the editors as sufficient to carry conviction with the Court.

In order to make room for a short discussion of some of the recent cases to which we have referred the elaborate treatment of such cases as *Osborne* v. *L. & N.W. Rly.*, not now of much importance, might have been omitted.

Finally, we will mention a few points of detail. We doubt whether *Lloyd* v. *Grace, Smith & Co.* can be regarded as having such a sweeping

effect as would be gathered from pp. 70 and 74. Surely it must be limited to cases in which the plaintiff has been invited to enter into relationship with the defendant's servant. *Smith* v. *Streatfield*, cited on p. 612 without comment, has been doubted both in England and Australia. There should have been a reference to *Herniman* v. *Smith* (see 53 *L.Q.R.* 12).

More important is the fact that the view is apparently adopted that *Earl* v. *Lubbock* is no longer law (see pp. 280–2, 526, 541). That was not the view of Lord Atkin in *Donoghue* v. *Stevenson*, [1932] A.C. p. 592, nor apparently is it the view of Lord Wright in *Grant* v. *Australian Knitting Mills Ltd.*, [1936] A.C. p. 107. The editors seem to attach a disproportionate importance to the judgments of judges of first instance in *Malfroot* v. *Noxol, Ltd.* and *Brown* v. *Cotterill*. The reference to the latter on p. 280 incidentally should be to 51 *T.L.R.* 21, not 551. The defendant's name in the case cited in note (*x*) on p. 286 was St*an*borough, not St*one*borough.

It is the misfortune, not the fault, of Mr. Reginald Jones, that the Trade Marks Amendment Act, 1937, now incorporated in the Trade Marks Act, 1938, which radically altered the law, should have made some of his work already obsolete.

But we would wish to end on a note of congratulation on a heavy task conscientiously performed which will keep *Clerk and Lindsell* on the shelves for many a long year.

W. T. S. Stallybrass

UNDERHILL'S LAW OF TORTS. Thirteenth edition, by Ralph Sutton, M.A., K.C. London, Butterworth & Co., 1937. **12s. 6d.** net.

The new edition of this well-known student's book reaches a high standard. On 393 octavo pages a wealth of material, up to October, 1937, is dealt with and set forth in clear and concise rules. Hardly a decision of importance seems to have been missed. Compared with the more ambitious and voluminous textbooks of Pollock, Salmond, Winfield, Clerk and Lindsell, this book has the advantage of stating its rules concisely and hardly fettered by doubt, as becomes a book for Bar students. It has the disadvantage of having to represent as fixed and clear a subject which is, probably more than any other, in a state of flux and transformation. The main value of the book is for the beginner, as a masterly exposition of elementary principles, and for the very advanced student as reference for quick orientation.

One or two observations might be added. A book of this type has little space for an explanation of the *ratio legis*. Where it does so, it does not always do justice to the problem. Thus, the reason for the rule as to volunteer servants is said to be obvious, without an indication of the inadequacy of a law which punishes the social instinct, an attitude against which *Haynes* v. *Harwood* represents a partial revolt. The learned editor has entirely rewritten the chapter on liability for independent contractors, which now gives a very up to date and clear account of that difficult part of the law. But the omission of the important decision of *Matania* v. *National Provincial Bank*, [1936] 2 All E.R. 638, is surprising. Probably for reasons of space, authors are never quoted. But when the statement of a principle is so obviously taken from a recent article, which runs contrary to the traditional presentation of the law (Art. 125 (1), (*a*) (*cf.* Chapman, 50 L.Q.R. 71) an exception should have been made. The section on Common Employment is, of course, substantially affected by *Wilsons & Clyde*

Coal Co. v. *English* (1937), 53 T.L.R. 944, which clearly overrules *Fanton* v. *Denville*, stated as authoritative in the present edition.

A new and original arrangement is the placing of the sections on Liability for Torts committed by others, Liability of employers for injuries to servants and workmen, Damages in Tort, Injunctions, Limitation, as "Miscellaneous" matters, at the end of the book. The distinguished editor's rich teaching experience has no doubt caused this change. But it is submitted that in a systematic rearrangement of the Law of Tort these matters would, as in the other textbooks, be embodied in the General Part, preceding special torts.

W. FRIEDMANN

THE PRIVATE INTERNATIONAL LAW OF SUCCESSION IN ENGLAND, AMERICA AND GERMANY. By WALTER BRESLAUER. London, Sweet & Maxwell. 339 pages. **£1 1s.** net.

It was undoubtedly a fortunate idea to devote a comprehensive monograph to the Private International Law of Succession. Though the subject is of great practical importance, many a member of the profession must have had occasion to feel that there are numerous problems still to be solved or even to be raised. This becomes particularly evident if English law comes into contact, or rather into conflict, with the fundamentally different systems of law prevailing on the Continent.

The author, a German lawyer by training, contrasts German law with Anglo-American law. He does not employ the illustrative method of comparative research, but the descriptive. He therefore does not make American and German law subservient to the exposition and clarification of English law; instead he treats the three systems on an equal footing and thus gives a practically complete picture of each of them; indeed, while one cannot help feeling that the law of the United States has not received perhaps quite the same attention (the author's extensive use of the indirect evidence found in a German text book on American Law of Succession may account for this impression), there may be readers who would have forgiven the author if he had dealt with some of the perplexing and intricate details of German law less carefully, and confined himself to its more general aspects, especially if some regard had been had to French law. But this is not the comprehensiveness of a compiler, but that of a very seriously minded scholar who has collected much valuable material, who has dealt with many situations and problems hitherto unobserved, developed many novel ideas and solutions and succeeded in producing a very useful and welcome book.

It is divided into six parts dealing with Preliminary Matters (Classification, Renvoi, Domicil, Nationality), Intestate Succession, Testamentary Succession, Administration, Jurisdiction and Death Duties. Under these headings the author deals with all questions which can possibly arise. (Incidentally, on p. 77 reference to the decision of the Berlin Court of Appeal in *Juristische Wochenschrift* 1932, 598, might be important, and the remarks on Death Duties might have been enriched by a reference to Mueller, *Zeitschrift für Ausländisches und Internationales Privatrecht* and to Supreme Finance Court, *Reichssteuerblatt* 1935, 1366; 1936, 313, and, recently, 1938, 10.)

The book is arranged after the pattern set by Dicey. Almost each of the 59 chapters opens with an abstract exposition of the law and is followed by illustrations of which there are about 250 in all.

The author states that he adopted this method, because he made "practical utility his chief subject" (read: object). This is a delicate point. As with Dicey, which after all is a book of reference, the combination, or rather the separation, of text and illustrations does not enhance readability, and Dr. Breslauer's book makes still less attractive reading in view of its sometimes awkward style, misprints and rather unfortunate translations of German words; such expressions as "forced heirship" (Pflichtteil), "contestation" (Anfechtung), "court of procedure" (Prozessgericht), "limited heir" (Vorerbe) and the regrettable use of the word "domicil" for the German "Wohnsitz" which is very different from domicile, are outstanding examples of the latter class. Moreover, there is often a surprising lack of discussion which tends to accentuate a certain boldness of statement: e.g. it is a noteworthy suggestion that the essential validity of wills should be governed by the "proper law" intended by the testator, but it is not quite adequate to rely nearly exclusively on the question "why not grant the testators the same privileges as to parties to a contract" (p. 129). A similar treatment is extended to judicial authorities. It is only in a very few instances that the author states the facts of a case or enters into a discussion of the Court's reasoning, dicta or methods of approach. The cases are mentioned, but not analysed. That this affects the liveliness of the text is only one of the consequences.

F. A. MANN

AN INTRODUCTION TO EQUITY. By G. W. KEETON, M.A., LL.D. London: Pitman & Sons, Ltd. 1938. Pp. xxx and 242. **17s. 6d.** net.

It is the pleasant duty of the reviewer to congratulate the author both on his elevation to the position of Professor in the University of London, and on the excellence of his "Introduction to Equity." The book starts with a brief discussion of Equity and the nature of equitable rights, without, however, mentioning the articles on the latter subject in 17 *Columbia Law Review* at pp. 269 and 467 by A. W. Scott and Mr. Justice Stone, and then gives an historical account of the development of equitable jurisdiction, which calls for comment on only two points. It would be desirable to mention the Judicature Act, 1881, s. 2, which transformed the Master of the Rolls from the head of the Chancery Division into the president of the Court of Appeal, and to refashion the short account of Lord Mansfield's activities. Junius would have been startled—and rightly so—to be told, as we are at p. 35, that "with Lord Camden . . . he defended the subject against the arbitrary interference of the executive in *Wilkes* v. *Wood*, *Entick* v. *Carrington*, and *Leach* v. *Money*," for Mansfield took no part in the first two decisions and adopted a reactionary attitude, diametrically opposed to that of Lord Camden, towards the rôle of the jury in trials for criminal libel, which was the most important question of public law arising in that period. In dealing with Mansfield's efforts to infuse equitable doctrines into the Common Law, it should be noted that he had quite an extensive Equity practice while at the Bar (*Duffield* v. *Elwes* (1827), 1 Bli. N.S. 497 at p. 538), and that even Lord Eldon questioned his views on Equity with great humility (*Id.* at p. 541). The third chapter, on the Relation between Law and Equity, is the best in the book and gives the most lucid exposition of that very difficult subject which can be found anywhere. In particular, the sections dealing with the Effect of a written Lease, Licences at Law and in Equity, and Concealed

Fraud, merit close attention. We would suggest that authority, such as the remarks of Chitty, J., in *Lavery* v. *Pursell* in 39 Ch. D. at p. 519, be cited for the statement in footnote (4) on p. 70 that "Equity will not support specific performance of a lease for less than a year." Chapter IV deals with the Maxims of Equity, of which Professor Keeton thinks thirteen are worthy of treatment, the additional one to the twelve given by Snell and Hanbury being that "Equitable Remedies are Discretionary." In the discussion of the maxim "Where the Equities are Equal the Law Prevails," there is a mistake in the exposition of the post-1925 law of Tacking. The effect of sub-ss. (1) (*b*) and sub-s. 2 of s. 94 of the Law of Property Act, 1925, is not to permit tacking only where the original mortgage is made expressly for the purpose of securing a current account or further advances and the mortgagee has no actual notice of intervening incumbrances. *Any* mortgagee can tack provided that he has no notice of such incumbrances (ss. (1) (*b*)), but registration is equivalent to notice except where the prior mortgage is made to secure a current account or further advances (ss. (2)). On p. 121, on the sixth line from the bottom, "mortgagee" should be read instead of "mortgagor," and on p. 130 it should be noted that the right to consolidate was first taken away by the Conveyancing Act, 1881, s. 17, and not by the Law of Property Act, 1925, s. 93. There are some curious misstatements about the rank of various judges. Vaughan was never Lord Chief Justice, but only Chief Justice of the Common Pleas with a knighthood (p. 63), Lindley was a Lord Justice in 1895 (p. 78), Cotton went straight to the Court of Appeal and never was a puisne judge (p. 89), while the judge who decided *Steeds* v. *Steeds* (1889), 22 Q.B.D. 537 was Wills, J., and not Willes, J. (p. 102). Then follows an admirable chapter on the Assignment of Choses in Action which can be recommended as warmly as the chapter on the Relation between Law and Equity, especially for its discussion of the question whether consideration is necessary in equitable assignments. There the book might well have ended, for the remaining chapters deal with specific doctrines of Equity, such as Election and Satisfaction, which are out of place in an introduction to that subject. But, as the author points out in the preface, "the form of the work has to a considerable extent been determined by the fact that it is one of a series," and perhaps these doctrines can be treated as conveniently here as anywhere else. We think that this book is a most valuable addition to the series, not only because it provides an excellent introduction to the study of Equity, but also because it gives students who are not taking Equity as a special subject a compact and accessible source of information on those aspects of Equity which are important in Real Property, Contract and Tort.

D. W. Logan

PRINCIPLES OF COMMON LAW. By A. M. Wilshere, M.A., LL.B. Fourth Edition. Sweet & Maxwell, London, 1937.

The new edition has been largely altered. The chapters on Landlord and Tenant, on Patents, Copyrights, and Trade Marks have been dropped. On the other hand, the treatment of Contracts and Torts, including Commercial Law and Evidence, is more detailed. For a concise, clear, and systematic presentation of a wealth of material the present edition can be unreservedly recommended, while it would hardly claim any originality of research. Some chapters, e.g. that on Implied Contracts, are actually

superior in systematic clarity to the treatment of the same matter in leading textbooks.

As a reference book for practitioners, and as a revision book for students, *Wilshere's Common Law* will continue to be of great value.

YEARLY SUPREME COURT PRACTICE, 1938. By P. R. SIMNER, H. G. MEYER, H. HINTON, and F. C. ALLOWAY. London: Butterworth & Co. (Publishers) Ltd. Pp. cccclxxxiii + 2670 + 429. **45s.**

The Red Book for 1938 has reappeared under the same distinguished editorship and either it or the White Book is indispensable to all practising lawyers. The Matrimonial Causes Act, 1937, is set out in full and its effect considered, but the new Rules made as a result of it were not promulgated in time for inclusion, neither, and even more unfortunately, were the new Supreme Court Rules referred to in our previous number at pp. 313–314.

HINTS FOR YOUNG SOLICITORS AND ARTICLED CLERKS. By SIR J. ROGER B. GREGORY, and M. F. TWEEDIE, revised by L. J. D. BUNKER, LL.B. 1938, Butterworth & Co. (Publishers) Ltd. Pp. 56. **2s. 6d.**